Elyria Foundry Company *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) Region 2 *and* William Nieves *and* Rickie Porter *and* Daniel L. Oestreicher. Cases 8–CA–25191, 8–CA–25277, 8–CA–25605, 8–CA–25942, 8–CA–25943, 8–CA–26187, 8–CA–26241, 8–CA–25769, 8–CA–25770, 8–CA–25944

August 27, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On April 25, 1995, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed exceptions and a brief both in support of his exceptions and in support of the judge's decision, and the Respondent filed a brief answering the General Counsel's exceptions and supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs,[2] and has decided to affirm the judge's rulings, findings,[3] and conclusions as modified, and to adopt the recommended Order as modified and set forth in full below.[4]

1. The Respondent manufactures steel castings at its foundry in Elyria, Ohio; it employs about 250 workers. The judge found, and we agree, that from January 1993[5] until at least the spring of 1994, the Respondent committed various unfair labor practices in reaction to a campaign by the Union to organize the employees. In the judge's view, some of the unfair labor practices were designed to neutralize immediately the spread of the organizing—for example, an unlawful threat by the Respondent's owner to sell the foundry, an unlawful promise to remedy grievances, providing unlawful assistance to an antiunion employee group, and unlawful enforcement of a no-solicitation/no-distribution rule. Other violations, according to the judge, were for the purpose of retaliating against those individual employees understood to be important in promoting the Union—for instance, unlawful threats of discharge, discriminatory withdrawal of overtime benefits, and discriminatory suspensions and discharges. The judge also dismissed certain unfair labor practice allegations, among them an allegation by the General Counsel that the Respondent unlawfully suspended all Sunday overtime work in the maintenance department from February until July in response to the organizing campaign. We disagree with the dismissal of this allegation, and we conclude that the elimination of Sunday overtime violated Section 8(a)(3) and (1).

The Respondent became aware of the Union's campaign in late January. Gregory Foster, the Respondent's president and owner, immediately responded by arranging for a special meeting of the employees—to permit them to air their complaints, and to permit management to evaluate the situation and stop the Union's campaign. As Foster explained to his ''communications committee'' on January 22, he aimed to ''nip it in the bud, before it got out of hand.'' The special meeting was held on January 26. As more fully detailed by the judge, at this meeting Foster unlawfully told the employees that he would sell the Company if the organizing effort resulted in a vote on union representation. He also solicited their grievances and coupled the solicitation with an unlawful promise to remedy them.

By confidential memorandum dated February 1, Foster explained to James Ellison, foreman of the Respondent's maintenance department, that one of the most significant issues raised at the January 26 meeting involved complaints of excessive overtime work in the maintenance department.[6] Foster noted that this was ''primarily a safety and health issue, and we have discussed it many times over the past several years.'' Acknowledging that a reduction in overtime would draw a mixed reaction from the employees,[7] Foster nevertheless ordered Ellison, inter alia, to cut out all Sunday overtime ''except in the case of dire emergency,'' and to increase the manning of the department

[1] The Respondent also filed a motion for rehearing, and the General Counsel filed a related motion to strike. Each of these parties also filed an opposition brief and the Respondent filed a reply brief. Both motions are discussed below in part 2 of the Board's decision.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, the Respondent contends that the judge's conduct of the hearing and his rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that such contentions are without merit.

[4] We will modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), in addition to other remedial modifications discussed below.

[5] All dates hereafter are in 1993 unless otherwise noted.

[6] The record makes clear that extensive weekend overtime had become routine in the maintenance department for at least the preceding few years.

[7] The record establishes that although some maintenance employees felt the overtime work was excessive, others favored it because of its financial benefits.

to bring about an effective overtime reduction. Foster's stated justification was the ''safety and health aspect of this issue.''

At about this time, Ellison had a conversation with Dan Johnson, the Respondent's general foreman. According to Johnson's credited testimony, Ellison said that upper management was placing him under considerable pressure because it had been discovered that the organizing drive had started in the maintenance department. Ellison vowed that he would not lose his job over the union situation: ''I'm going to hire more people and cut all the overtime down. . . . I'll take care of these guys.'' According to Johnson, Ellison also said that he would ''hurt them where it hurts the most,'' i.e., in their wallets.

Beginning in mid-February and continuing for 5 months, Sunday overtime work in the maintenance department ceased for all three shifts; the only exceptions were three particular Sundays when the third shift worked overtime. Sunday overtime resumed in mid-July, about the time that William Nieves, a maintenance department employee and a principal union proponent, was unlawfully discharged. Further, according to Ellison's testimony, additional employees were hired in February to work in the maintenance department in order to reduce the need for overtime.

The issue is whether the Respondent's cessation of Sunday overtime work in the maintenance department was unlawfully motivated and therefore violated Section 8(a)(3) and (1) of the Act. The standard for evaluating discrimination allegations turning on employer motivation is set forth in *Wright Line*.[8] The General Counsel established that it was the Respondent's understanding that the union organizing drive began among the maintenance department employees. The General Counsel also provided significant evidence of union animus and motivation in the form of Ellison's statements to Johnson that he would impose a financial penalty by cutting overtime work in response to the maintenance employees' union activity. In addition, there is voluminous evidence of animus in the number and nature of the contemporaneous unfair labor practices committed by the Respondent. We note in particular those committed at the January 26 employee meeting, which were designed to extinguish the organizing campaign in its incipient stage. The timing of the Sunday overtime cut, early in the organizing drive and following closely the unlawful events of the January 26 meeting, would suggest that this conduct was also designed ''to nip it in the bud.'' The General Counsel has made a clear prima facie case that the termination of Sunday overtime work was a matter of unlawful retaliation against the employees in the department where the Respondent suspected that the protected activity had begun.

It was then the Respondent's burden to show that it would have stopped the Sunday overtime work even in the absence of the organizing campaign. We disagree with the judge that the Respondent satisfied this showing by the ''safety and health'' explanation set forth in Foster's February 1 memo. The memo plainly states that ''we have discussed [the safety and health issue] many times over the past several years.'' Moreover, the record is consistent to the extent that extensive weekend overtime in the maintenance department had been the norm for a considerable period of time. However, the Respondent provided no evidence to elucidate the critical issue: Why did the health and safety question become more urgent at the time of the February 1 memo than it had been in the considerable period of time before the organizing campaign started? In addition, the Respondent offered no health-and-safety-related explanation for permitting the *resumption* of Sunday overtime in mid-July, at a time when a leading union supporter in the maintenance department had just been unlawfully discharged. In the absence of this critical evidence defining why ''health and safety'' was germane on February 1, but at no other time either before or after that date, we find that the Respondent has not demonstrated that it would have terminated Sunday overtime work in the maintenance department in the absence of the lawful union activity of its employees. We further find that the Respondent's unlawful motive was a matter of both antiunion campaign strategy and retribution against the entire maintenance department, because the Respondent perceived that the organizing drive had started there. Accordingly, the Respondent violated Section 8(a)(3) and (1) of the Act by canceling Sunday overtime work in the maintenance department.[9]

2. In the course of four separate analyses in which the judge concluded that unlawful discrimination had occurred, he found, either explicitly or implicitly, that the Respondent produced evidence which had been fraudulently created for the trial: at judge's decision, section II,D,5,c (R. Exh. 44, discriminatee Rickie Porter); at judge's decision, section II,D,6,b,(4) (R. Exh. 57, discriminatee Nieves); at judge's decision, section II,D,6,d,(6)–(9), (''altered wire,'' discriminatee Nieves); and at judge's decision, section II,D,9,c (R. Exh. 67, discriminatee Carroll). Based on a careful review

[8] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[9] We note that there is at least some evidence that Respondent President Foster eliminated the Sunday overtime not as an act of retribution but rather in response to employee complaints about excessive overtime. However, even if this were so, the action would nonetheless be unlawful. The evidence establishes that the action was taken because of the union campaign and was designed to ''nip it in the bud.'' Given this motive, it makes no difference whether the acts were beneficial or detrimental. In either event, they were designed to ''discourage'' union activity.

of the record and the judge's decision, we find it unnecessary to rely on his findings of apparent fraud in these four instances. In each case, the judge's crediting and discrediting of witnesses on traditional credibility grounds and his consequent assignments of weight to the Respondent's documentary evidence are more than adequate to sustain the unfair labor practices found. Further, in each instance, it is the judge's credibility resolutions which form the analytical foundation for the fraud findings, and *not* the other way around. Accordingly, the judge's credibility findings are separable from his affirmative findings of fraud. We affirm the judge's ultimate findings of unfair labor practices in these four situations consistent with the above.

In addition, we do not adopt the judge's recommendation to refer one of the instances above, the ''altered wire'' situation, to the Department of Justice for investigation. See judge's decision, section II,D,6,d,(9). On our evaluation of the record and the circumstances of this case, we believe that a referral is not warranted. However, we note that the Board does possess the authority to order such a referral for criminal investigation, and we will not hesitate to exercise it in an appropriate case in order to protect the Board's process. See, e.g., *Multimatic Products*, 288 NLRB 1279, 1335–1337 (1988); see also, e.g., 18 U.S.C. § 1001.

In light of our determination not to rely on the judge's affirmative findings of fraud, as explained above, the issues the Respondent raises in its motion for rehearing concerning these matters are moot or otherwise lacking in merit. Therefore, the motion is denied. Similarly, we deny the General Counsel's motion to strike certain documents attached both to the Respondent's brief answering the General Counsel's exceptions and to the Respondent's brief in reply to the General Counsel's opposition to the motion for rehearing. In our view, these documents are simply offers of proof rather than evidence per se and are related to the Respondent's motion for rehearing, which we have denied as moot. Accordingly, it is unnecessary to strike them from the record.[10]

3. We find merit in the General Counsel's exceptions to the judge's failure to include a broad cease-and-desist order in his recommended remedy. The Respondent has engaged in a variety of severe, egregious unfair labor practices. Its widespread misconduct demonstrates a general disregard for the employees' fundamental rights protected by the Act. Accordingly, it is appropriate to issue an order requiring the Respondent to cease and desist from infringing in any other manner on the employees' statutory rights. See, e.g., *Opportunity Homes, Inc.*, 315 NLRB 1210, 1211 (1994); *Hickmott Foods*, 242 NLRB 1357 (1979).

[10] To the extent that the General Counsel's motion to strike alleges procedural irregularities in the filing of the Respondent's briefs above, it is denied as lacking in merit.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Elyria Foundry Company, Elyria, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, suspending, issuing warnings to, or otherwise discriminating against any employee for supporting International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) Region 2, or any other union.

(b) Denying overtime work to union supporters because of their union activity.

(c) Threatening to discharge union supporters because of their union activity.

(d) Engaging in coercive surveillance of union supporters.

(e) Threatening to sell the Company or soliciting employee complaints and implying it would remedy grievances if employees abandon the Union.

(f) Distributing a forged union notice to intimidate union supporters.

(g) Distributing a form letter for requesting return of union card.

(h) Providing unlawful assistance to Workers United with Employer or disparately enforcing the no-solicitation clause.

(i) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer William Nieves, Rickie Porter, and Stephen Carroll full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make William Nieves, Rickie Porter, and Stephen Carroll whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to (1) the unlawful discharges, (2) the threats to terminate William Nieves, Steven Porter, Robert Bunting, and Richard Moran, and (3) the warnings issued to Robert Bunting and Daniel Oestreicher, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges, threats, and/or warnings will not be used against them in any way.

(d) Make William Nieves and Steven Porter whole for any loss of earnings and other benefits suffered as a result of their suspensions and denial of overtime pay for Saturday work, plus interest.

(e) Make Steven Porter and Robert Bunting whole for any loss of earnings and other benefits suffered as a result of its denying assignments to Porter of Sunday overtime work after July 12, 1993, and to Bunting of weekend overtime work beginning in September 1993, plus interest.

(f) Make whole the employees of the maintenance department for any loss of earnings and other benefits suffered as a result of the discriminatory cessation of Sunday overtime work between the week ending February 14, 1993, and the week ending July 11, 1993, plus interest.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its foundry in Elyria, Ohio, copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 3, 1993.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge, suspend, issue warnings to, or otherwise discriminate against any of you for supporting International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) Region 2, or any other union.

WE WILL NOT deny overtime work to any of you for supporting the Union.

WE WILL NOT threaten to discharge you for supporting the Union.

WE WILL NOT engage in coercive surveillance of union supporters.

WE WILL NOT threaten to sell the Company or solicit complaints and imply remedying grievances if you abandon the Union.

WE WILL NOT distribute a forged union notice to intimidate union supporters.

WE WILL NOT distribute a form letter for requesting return of union card.

WE WILL NOT provide unlawful assistance to Workers United with Employer or disparately enforce the no-solicitation clause.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer William Nieves, Rickie Porter, and Stephen Carroll full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make William Nieves, Rickie Porter, and Stephen Carroll whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of William Nieves, Rickie Porter, and Stephen Carroll, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to

the threats to terminate William Nieves, Stephen Porter, Robert Bunting, and Richard Moran, and the warnings issued against Robert Bunting and Daniel Oestreicher, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the threats and/or warnings will not be used against them in any way.

WE WILL make William Nieves and Steven Porter whole for any loss of earnings and other benefits suffered as a result of their suspensions and denial of overtime pay for Saturday work, plus interest.

WE WILL make Steven Porter and Robert Bunting whole for any loss of earnings and other benefits resulting from the denial of assignments to Porter of Sunday overtime work after July 12, 1993, and to Bunting of weekend overtime work beginning in September 1993, plus interest.

WE WILL make whole the employees of the maintenance department for any loss of earnings and other benefits resulting from the discriminatory cessation of Sunday overtime work between the week ending February 14, 1993, and the week ending July 11, 1993, plus interest.

ELYRIA FOUNDRY COMPANY

Paul C. Lund, Esq., for the General Counsel.
Stephen J. Sferra and *William J. Evans, Esqs. (Duvin, Cahn, Bernard & Messerman)*, of Cleveland, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. These cases were tried in Cleveland, Ohio, on May 23–27 and June 13–17, 1994. The charges were filed from February 3, 1993,[1] through March 23, 1994, and the third consolidated complaint was issued on April 29, 1994.

In response to the Union's organizing campaign, President Gregory Foster held employee meetings and threatened to sell the plant if the organizing effort went to a vote. After the employees overwhelmingly turned against the Union in fear of losing their jobs, the Company forged and distributing a purported union notice to intimidate union organizers. Then, as credibly revealed by former General Foreman Daniel Johnson, the Company planned to get rid of union organizers. Near the close of the long trial, the Company produced a clearly altered piece of wire (not offered in evidence) in an effort to bolster its defense for discharging William Nieves, whom Foster identified as one of the principal organizers.

The primary issues are whether the Company (the Respondent) (1) unlawfully disciplined and discharged union supporters and (2) engaged in other coercive conduct to undercut the union organizing campaign, violating Section 8(a)(1) and (3) of the National Labor Relations Act.

[1] All dates are in 1993 unless otherwise indicated.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, manufactures metal steel castings at its foundry in Elyria, Ohio, where it annually ships goods valued over $50,000 directly outside the State. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

President Gregory Foster, the sole owner of the nonunion Elyria foundry, acquired the Company in 1983 when, as the Company describes in its brief (at p. 4), ''he literally purchased it from the scrap heap, months before being closed by its former owner.'' Since then, the Company's complement of hourly employees has grown from 68 to about 240 or 250, its annual sales have climbed from $3 million to $35 million, and the accolades for the Company's successful turnaround ''have included Foster's selection in 1992 as the Inc. magazine's Entrepreneur-of-the-Year for turnarounds.'' (Tr. 55, pp. 1174–1177.)

For good employee relations, the Company has an open-door policy and Foster holds quarterly employee meetings as well as monthly meetings of the ''Communications Committee.'' This communications committee consists of management, supervision, and employees from the various departments. Foster discusses with the committee the state of the business, new customers and expansion plans, backlog of work, hiring plans, suggestions for improvement, items from suggestion boxes in the plant, and employee complaints. (Tr. 1067–1068, 1119–1121, 1178–1184, 1239–1247.)

On January 21 the Company learned that the union organizing campaign was taking place (Tr. 79–80, 1255).

B. *Soliciting Complaints and Threats to Sell the Plant*

1. March employee meeting held in January

On January 22, the day after learning about the union organizing campaign, President Foster held a meeting of the communications committee. As credibly testified by employee Robert Bunting (then a member of the committee but later known to Foster as one of the principal union organizers), Foster told the committee that he ''felt that maybe it would be better to move the quarterly meeting up to maybe sometime that month and not have to wait until March to do it.'' He said that they could have ''an open bitch and gripe session. . . . to feel the guys out and see what the problem was and maybe stop [the union campaign], *nip it in the bud*, before it got out of hand.'' [Emphasis added.] (Tr. 1067–1069, 1118–1119, 1255.)

Foster held this first quarterly meeting of the year on January 26, instead of holding it as usual in March (3 months after the fourth quarterly, or annual, meeting in December).

About 150 employees attended the meeting. After some announcements, Foster opened the meeting to questions and answers, asking ''what was going on with the employees'' and how they were being treated. Although William Nieves, a leading union organizer, raised his hand three times to ask questions, Foster ignored and ''bypassed'' him. By that time, as elicited by the company counsel on cross-examination of Nieves, he was well known as a ''vocal and visible union supporter.'' (Tr. 37–38, 86–87, 565–568, 653, 1069, 1183–1186, 1246–1247, 1255–1257.)

The employees raised such problems as (1) senior employees not being moved to other departments, (2) foremen's relatives getting better jobs than employees with longer service, (3) men coming in off the street and going straight to top-rate jobs that employees wanted, (4) overtime distribution, with some departments not getting enough overtime and overtime being given to less senior employees, (5) too much overtime in the cleaning and maintenance departments and men being written up for not working on Sundays, and (6) mistreatment by supervisors. As in previous meetings, Foster's usual response was ''We will check into it.'' Or he would say that ''should have never happened, fellas, and I will look into it.'' (Tr. 566, 654–656, 698, 839–840, 896–898, 1070–1071, 1122, 1185–1189, 1214–1215, 1257–1260, 1262, 2440-2441, 2640-2641).

2. Threats to sell

Foster said nothing about the union organizing campaign in the first hour or so of the meeting. Finally, whether or not by prearrangement, group leader Jimmy Terry (who did not testify) ''opened the floor for Mr. Foster to talk about the Union.'' Foster then expressed his personal distress, calling the organizing effort a strong vote of no confidence in his leadership. He stated that as president and owner of the company, the only way he could leave was to sell his interest, and that the employees ''had a choice between the Union and me.'' (Tr. 39–43, 566–567, 839, 1069, 1185–1186, 1189–1191, 1216–1217, 1256, 1260–1262, 1376–1378).

Foster admitted (Tr. 43):

> Q. And isn't it also true that you told the employees at that meeting that *if the organizing effort went to a vote, you would sell the company*?
>
> A. That's correct. [Emphasis added.]

This threat, in the circumstances of Foster's personal achievement in turning the Company around—making it a thriving enterprise and giving employment to an increasing number of employees—had the obviously intended effect.

Until then, the union organizing campaign had widespread employee support. As employee organizer Robert Bunting credibly testified, ''We were strong'' before that meeting, ''In my opinion, we could have had a union in there within I would say 30 days. We had a great support and great following.'' (Tr. 1144.) After that meeting, Bunting began receiving complaints from employees that his organizing for the Union was ''endangering their jobs'' (Tr. 1072). Many employees were signing petitions against ''any further union movements'' (R. Exh. 26). As elicited by the company counsel on cross-examination of Bunting (Tr. 1118):

> A. After the [January 26] meeting there was a lot of people who did not care for the Union, this is correct.
>
> Q. And the *vast majority of the people* were supporting the Company?
>
> A. *Did not want the Union*. [Emphasis added.]

The Company argues in its brief (at 10–11) that ''Foster lawfully stated that if the majority of employees did favor union representation over his management, he would accede to those desires in the only effective way possible—by selling his interest. . . . Foster made no statements that he would close or relocate the plant. Nor did he state that Elyria Foundry's existence or employees' jobs would be jeopardized if such a sale materialized.''

I find, however, that particularly in view of Foster's being the well-publicized savior of the Company, his threat to sell—both on January 26 and to the third shift on January 27 (Tr. 37, 43, 86)—obviously tended to convey the message that if the employees supported the Union, their jobs would be in jeopardy. I therefore agree with the General Counsel that Foster's threat to sell the Company ''could reasonably be expected to have a coercive effect'' and violated Section 8(a)(1) of the Act.

The General Counsel contends in his brief (at 5) that it is clear that the January 26 meeting was intended to elicit problems that employees were having, to ''nip the unionization in the bud.'' In support of the allegation in the complaint that the Company ''unlawfully solicited and implied it would remedy employee grievances,'' the General Counsel cites Foster's ''confidential'' memo to Maintenance General Foreman James Ellison, dated February 1 (5 days after the meeting). The memo (R. Exh. 60) entitled ''Maintenance Department Overtime'' is an obvious response to the ''most sensitive issue'' raised in the January 26 meeting:

> It appears that the *most sensitive* issue brought to light during our plant communication meeting is that of excessive overtime. This is primarily a safety and health issue, and we have *discussed it many times over the past several years*. It is also pretty clear that the sentiment against overtime in your department is greater than in other departments. In order to reverse that feeling we will immediately move to [eliminate all Sunday overtime except in dire emergency, etc.]. . . .
>
> There will be some disagreement within your department about this reduction of overtime, but in view of the safety and health aspect of this issue, we must *appease the people in your department* who are opposed to the considerable overtime we have been working. [Emphasis added.]

The Company argues in its brief (at 27–30) that Foster's only response in the meeting was that he would ''look into'' the various complaints raised in the ''bitch and gripe'' session, that this was ''entirely consistent'' with its open door communications and previous plantwide quarterly meetings, and that therefore the Company did not unlawfully solicit and promise to remedy the employee grievances. I do not agree.

As announced at the January 22 meeting of the communications committee, Foster held this quarterly meeting in January, about 2 months earlier than usual, for the specific purpose of having an open ''bitch and gripe'' session to

''feel the guys out,'' maybe stopping the union campaign and ''nip[ping] it in the bud'' before it got out of hand. It was undoubtedly obvious to the employees—as well as those on the communications committee who heard the January 22 announcement—that the March quarterly meeting was being held in January in response to the Union's organizing campaign.

I find that particularly in the context of the threat to sell the Company if the union organizing effort went to a vote, the Company's holding the ''bitch and gripe'' session at that time reasonably tended to convey a signal to the employees that if they abandoned the Union, the Company would remedy at least some of their grievances. I therefore find, as alleged in the complaint, that the Company unlawfully solicited and implied it would remedy employee grievances, violating Section 8(a)(1).

C. *Other Conduct to Undercut Union Campaign*

1. Forged union notice

a. *Forging and distributing document*

On February 3 or 4 General Superintendent Potts called General Foreman Daniel ''Dan'' Johnson into his office and, in the presence of Vice President Floyd Baum, handed him copies of a purported union notice. On union letterhead, the notice was addressed to all employees and was entitled ''YOUR LEADERS.'' It named eight union officers and stewards—although none had been elected or designated. They included ''President'' Bill Nieves and ''Treasurer'' Steve Porter in the maintenance department and Robert Bunting as the ''Shop Steward'' on nights in the No. 2 core department. (G.C. Exh. 11; Tr. 82–83, 103, 568.)

Potts told Johnson to put copies in places where ''people would see them,'' but ''not to let anybody know that I'm handing them out'' because ''[t]hey didn't want [anybody] to know that I was passing them out.'' Johnson recalled placing copies in the melt and maintenance shops, Nos. 2 and 3 core rooms, the cleaning room, and foreman's office. (Tr. 83.)

The next day, Potts instructed Dan Johnson that if he had any copies of the notice out there in the plant, to pick them up and destroy them because ''It did the job. . . . That'll put the people in their place.'' Johnson heard from supervisors, and reported to Potts, that people on the list were being threatened by other employees. (Tr. 83–84, 102–105.)

As late as March 29 (over a month later) the Company was concealing the fact that it had forged the document. In a position letter on that date the Company's attorney (at the time) asserted: ''For all I know, the [Union] itself may have created the document and now finds it embarrassing for some reason.'' (G.C. Exh. 3 p. 4.) Vice President Baum testified that he had not told the attorney that he himself had in fact prepared the notice (Tr. 1389).

That position letter was submitted before Dan Johnson, who had been discharged on March 5, ''got religion'' (in the Company's derisive terms) and revealed to the Union and the Regional Office in November his insider view of what the Company had been doing before his discharge to undercut the organizing campaign.

b. *Baum's admission of forgery*

Vice President Baum admitted at the trial that he had forged the ''Your Leaders'' union notice (Tr. 1270, 1384–1387, 1390–1393). Baum gave the following explanation (Tr. 1270):

> A. I was *fooling around on my computer* and I had so many employees come in and give me names of people who were out there soliciting and trying to get people to sign cards and I just was fooling around on my computer and I just typed all this up.
>
> Q. Why did you do that?
>
> A. *There is no reason*. In fact, it *wasn't to go any further, I just typed it up and left it on my desk*. [Emphasis added.]

Despite his claim that he ''just typed it up and left it on [his] desk,'' Baum further testified (Tr. 1387) that he printed out the notice, placed a union letterhead above it, and put it in the copying machine—claiming, however, that he *made only one copy*.

Although Potts (not Baum) was the one who directed Dan Johnson to distribute the forged notice (Tr. 83), Baum, when answering the company counsel's specific questions (Tr. 1270–1271), denied posting the notice, denied directing Johnson to post it, denied directing Johnson to distribute it, and denied telling Johnson that it might be a good idea if it got passed around. Baum did not deny Dan Johnson's credited, undisputed testimony that Baum was present in Potts' office when *Potts* handed the copies to Johnson to distribute secretly.

I discredit Baum's claim that he made only one copy on the copying machine and his claim that the forged notice ''wasn't to go any further,'' that ''I just typed it up and left it on my desk.'' His credibility is discussed later.

Upon further interrogation by company counsel, Baum implied that Dan Johnson had made the copies and distributed them on his own. Baum did so by answering (Tr. 1271) ''Yes, sir'' to the counsel's question whether Johnson ''would have access'' to Baum's office.

In its brief (at 23) the Company misstates the record in footnote 8 by arguing that ''Baum credibly denied Dan Johnson's claim that *Baum* [emphasis added] had directed Johnson to distribute copies of the list throughout the plant.'' To the contrary, as found, Johnson testified that *Potts*, in Baum's presence, told him to distribute them. Johnson specifically testified (Tr. 82–83):

> I was called into Jim Potts' office and Floyd Baum was sitting there. And *Jim Potts* [emphasis added] gave me a half dozen of these to hand out into the shop and told me not to let anybody know that I'm handing them out.
>
> Q. Well, what did [he] tell you to do with them?
>
> A. He told me to put them in places to where that people would see them but not to be noticed. They didn't want nobody to know that I was passing them out.

In the same footnote the Company makes a further contention that is based on Baum's discredited claim that he just left the forged notice on his desk and it ''wasn't to go any further'' and his above-quoted ''Yes, sir'' answer to a com-

pany counsel question whether Johnson ''would have access'' to Baum's office. The Company contends (at Br. 23 fn. 8):

> According to Baum, after he generated the list he simply left a copy on his desk. Johnson had *free access to Baum's office* during the night shift and *may well have decided on his own* to leave copies of the list throughout the plant. [Emphasis added.]

c. *Foster's denial of knowledge*

When the Union on February 5 faxed a letter (G.C. Exh. 15) to Foster protesting the forgery, Foster ensured that the forged notice would have a maximum effect. He attached a copy of it and the Union's protest to his own ''Memo to All Employees,'' also dated February 5 (G.C. Exh. 4). He stated in the memo, in part: ''I . . . resent the implication that the [Union] is trying to accuse us of 'forging' the attached document.''

Although the notice had been forged by President Foster's vice president and was ordered distributed by his general superintendent in the presence of the vice president a day or two before, Foster claimed at the trial that at the time he wrote the memo, ''I did not know where it came from.'' He also claimed: ''I presumed it was a legitimate document'' from the organizing committee. (Tr. 45.) I discredit these unpersuasive claims. From Foster's demeanor on the stand, he did not impress me as being an entirely candid witness.

Later in the trial, Baum failed to confirm Foster's denials of knowledge of Baum's forgery when preparing the February 5 memo. Baum testified (Tr. 1388):

> Q. Did you tell Mr. Foster that it was you that had done that?
> A. Did I tell Mr. Foster?
> Q. Right.
> A. At some point in time, yes.
> Q. Did you tell him before he prepared that [memo]?
> A. *I don't know* as I told him before he prepared the [memo], but he doesn't indicate that in here, anyhow. [Emphasis added.]

I discredit Baum's claim, ''I don't know.'' There is no apparent reason for Baum and Potts, who were working with Foster to defeat the organizing effort, to have concealed the forgery of the document from Foster.

d. *Problems caused and concluding findings*

''President'' William Nieves credibly testified that the list of so-called officers on the forged notice (Tr. 569)

> served kind of like a blackball kind of thing. . . . it caused me problems with the employees because . . . anytime that the company would do anything that they felt was due to the union movement, they had somebody to come and blame . . . . ''You're one of them guys. . . . You're responsible [for] what's happening to us.''

''Treasurer'' Steve Porter credibly testified that he and others on the forged list were confronted by employees opposing their support of the Union. He was confronted on the job by employees circulating antiunion petitions, Gregg and Ronald Fretch and also Michael Lucan before Lucan became a supervisor. (Tr. 841–842; R. Exh. 26.)

''Shop Steward'' Robert Bunting found that some of the employees opposing the Union began shunning him. Others asked ''why I got involved in that shit,'' calling him ''a dumb ass for getting involved with it'' and telling him ''they wouldn't have nothing to do with me'' anymore. Employees also complained that Bunting was ''endangering their jobs, that Mr. Foster . . . wouldn't let a union get in there, wouldn't let it happen.'' (Tr. 1071–1072.)

The Company contends in its brief (at 22) that Baum prepared the ''Your Leaders'' list ''on a lark'' and that although his preparing it was ''arguably ill advised—given the Union's immediate and incensed reaction to it,'' the ''creation of the list was nonetheless lawful. . . . Baum acted alone in preparing the list. . . . Not even Gregg Foster was aware of what Baum had done.'' The Company concludes in its brief (at 26) that ''the General Counsel has failed to prove a 8(a)(1) violation relative to that list'' because the ''list cannot be viewed as creating an impression of unlawful surveillance.'' I disagree.

The Company's obvious motive for distributing the list of purported union ''Leaders'' was to intimidate the listed employees for engaging the protected concerted activity. Apart from the alleged creation of an impression of unlawful surveillance, I agree with the contention of the General Counsel in his brief (at 7) that distribution of the forged notice was intended to and did coerce employees in the exercise of their Section 7 rights, violating Section 8(a)(1).

2. Form request to return card

The Company prepared and had an employee distribute copies of a form letter for employees to send, requesting the Union to ''immediate[ly] return'' their signed authorization cards, purportedly because ''Your representative misrepresented the purpose of the signup card'' (G.C. Exh. 12).

Previously on January 22, the same day President Foster met with employees on the communications committee and announced a quarterly employee meeting that month to maybe stop the union campaign and ''nip it in the bud,'' he posted a memo to all employees. The memo (G.C. Exh. 2) concluded with the words, ''if for some reason you have already signed a card, I *urge* [emphasis added] you to ask for it back and destroy it.''

Four days later on January 26, as found, Foster held the employee meeting and gave the employees ''a choice between the Union and me'' and threatened to sell the Company ''if the organizing effort went to a vote.'' This was a threat to sell—not if a majority of the employees voted for union representation, but if the organizing effort even went to a vote in a Board election.

The message to the employees was clear. If the Union succeeded in getting a Board election, based on authorized cards that employees signed and did not withdraw, the employees' jobs would be in jeopardy because of Foster's threat to sell the Company. Foster's January 22 memo had advised them how they could withdraw their authorization of the Union as their bargaining representative—by his urging them to ask for their authorization cards back and destroy them.

I find it unnecessary to find whether Foster's urging the employees in writing to ask for their authorization cards

back, followed by his threat to sell the Company ''if the organizing effort went to a vote,'' would have been sufficiently coercive to violate Section 8(a)(1). The Company went further to emphasize the urgency of Foster's request that the employees ask for their cards back. After Foster made the threat to sell in the January 26 employee meeting, the Company prepared and had an employee distribute copies of the form letter, requesting immediate return of the authorization card.

Thus on February 3 or 4 (the same day Potts, in the presence of Baum, ordered Dan Johnson to distribute Baum's forged ''Your Leaders'' union notice), Potts handed Johnson copies of the form letter (G.C. Exh. 12) to hand out. When Johnson (as he credibly testified) asked, ''Who should I hand these out to?'' Baum spoke up and told Johnson ''to hand it to [employee] Andy Ward,'' that he ''knows what to do'' with them. (Tr. 85.) Ward did not testify.

Baum admitted that he prepared the form letter. He claimed, however, that he gave a copy of the letter only to probably three or four employees who came in and asked for it (Tr. 1276).

The Company represents in its brief (at 36) that ''Baum denied that he asked Dan Johnson'' to deliver the form letter to hourly employee Ward. I note, to the contrary, that Baum did not deny doing so.

After Baum denied ''distributing it to anyone who didn't ask for it'' and denied giving ''it to [his] supervisors to pass out,'' Baum merely answered ''No, sir'' to the company counsel's question, ''Did you become aware that Dan Johnson ever passed it out?'' (Tr. 1276–1277.) Neither Baum nor Potts denied Johnson's credited testimony that when Potts handed Johnson copies of the letter to hand out, Johnson asked Potts (Tr. 85):

> ''Who should I hand these out to?'' And Floyd Baum told me to hand it to Andy Ward.
>
> Q. And who was Andy Ward?
>
> A. He was just an hourly guy on the afternoon shift. And he said, ''Mr. Ward knows what to do with those.''

I find that the Company went beyond giving the form letter only to employees who requested it. Through employee Ward, the Company distributed copies of the withdrawal letter to other employees after President Foster threatened to sell the Company. The letter further coerced employees to withdraw their authorization cards as a means of preventing a vote, which could jeopardize their jobs because of Foster's threat.

I therefore find, as in *Uniontown Hospital Assn.*, 277 NLRB 1298, 1307 (1985) (cited in the Company's brief at 38), that the Company ''did more than advise employees that they could revoke signed union cards, [it] pressured the employees to do so'' by the threat to sell the Company if it came to a vote and by the distributing the form letter for employees to sign to protect their jobs, in violation of Section 8(a)(1) of the Act.

3. Assistance to procompany WUE

a. *Payment of cash*

The Company contends in its brief (at 39) that apprentice molder James ''Jim'' Johnson ''conceived, founded, financed and conducted the activities of the WUE [the procompany Workers United with Employer] entirely on his own, with no assistance of any type from the Company.'' The credible evidence is to the contrary.

Security Site Manager David Sprouse, who appeared to be a truthful witness, credibly testified (Tr. 158–159) that in the first part of February (about 2 or 3 weeks before President Gregory Foster admitted knowing anything about WUE, Tr. 1196–1197):

> A. Mr. Foster handed me an envelope and told me to deliver this to Jim Johnson for it contained *coupons for his family* [emphasis added]. . . . I took the envelope back into my office and I had tossed it on the desk and it had landed like propped up against the desk lamp and I seen what was the contents.
>
> Q. And what did you see?
>
> A. I seen $20 bills.
>
> Q. Then what did you do?
>
> A. Went to look into it because it just . . . didn't seem right to me, that someone I trusted told me that it was coupons and it turned out it was money. . . . I opened it up and I looked at it. And at that point Dan Johnson had walked into my office from the cleaning department and I tossed it on the desk out of panic because there was someone else and a $20 bill had come out.
>
> Q. Okay. What did you say to Johnson, do you recall?
>
> A. I said, ''This was supposed to be coupons for Jim Johnson.''

Dan Johnson then left to respond to a call from the melt department and Sprouse looked inside the envelope and counted $300 in $20 bills. Sprouse switched envelopes ''so it didn't look like . . . it was opened'' and gave the envelope to Jim Johnson when he came to work, telling him it was coupons from Foster. When Dan Johnson returned to the guard office, Sprouse told him ''there were a lot of 20s in the envelope.'' (Tr. 159–160, 183–188.)

As Dan Johnson recalled the incident, about mid-February he saw Foster heading toward his car. ''I stopped in the guard office'' and saw Sprouse throw some mail down on the desk. An envelope with Jim Johnson's name on it popped open and Dan Johnson saw a $20 bill. Sprouse said that Foster left it there for Jim Johnson and that it was supposed to be ''some coupons or tickets for Jim Johnson and his family.'' After responding to a call over the intercom from the melt shop, Dan Johnson approached Sprouse and commented that was a ''funny kind of coupons and tickets.'' Sprouse responded that ''there was a lot of 20s in it'' and that he had already given the envelope to Jim Johnson. (Tr. 91–92, 116, 142–144.)

When called as a defense witness, Jim Johnson denied that Foster had ever given him any money to finance his efforts

for WUE, but testified that about February 12 he asked Foster for a loan to help pay his $385 rent, due on February 15, and that Foster paid him $200 in cash by leaving it in an envelope with the guard. (Tr. 1490–1492.) On cross-examination, however, Johnson conceded that he had been paying out his personal money for WUE ''as opposed to paying [his] bills,'' not leaving enough money for paying his rent (Tr. 1512). Therefore, at least indirectly, Foster was financing WUE by paying Johnson money to reimburse him for money spent on WUE—if not money for Johnson to spend directly on WUE expenses.

Foster claimed that he never ''knowingly'' provided financial assistance to WUE and never ''knowingly'' gave Jim Johnson money to assist WUE. He testified that in mid-February he did make a cash ''loan'' to Johnson, placing the money in an envelope and leaving it with security guard Sprouse to give to him. Foster (like Jim Johnson) claimed that the amount of the ''loan'' was $200—not $300, which Sprouse counted. (Tr. 1194–1196, 1201.)

Foster testified that the ''loan'' to Johnson was a personal loan, for which he has no record. He claimed that he lent his own money to Johnson because ''It was just $200'' and ''I didn't see the need to do all the accounting to set up a company loan.'' In the absence of any record of the so-called ''loan,'' there is no substantiation of either the amount or the purported repayment of the ''loan.'' (Tr. 1127–1128, 1201–1211, 1225–1226, 1335; R. Exh. 11.)

Jim Johnson had started soliciting signatures on February 2 and had been making expenditures for WUE that month. He had never before been late paying his rent. Foster claimed that when Johnson called and asked him for $200 for rent, he asked no questions and agreed to make the personal loan because Johnson ''asked me for it.'' He claimed that he was not aware of WUE at the time. (Tr. 1195–1196, 1466–1477; R. Exhs. 29–31.)

Foster admitted that after his January 27 meeting with the third-shift employees (when he repeated the threat to sell the Company), Jim Johnson came up and ''asked if there was anything he could do to help the company'' (keep out the Union). According to Johnson, the conversation lasted ''about two minutes'' and ''I did tell [Foster] that I was going to try to do something.'' (Tr. 1193, 1450–1452.)

The Company offers no explanation for Foster's telling Sprouse that the envelope contained coupons for the Johnson family.

I credit Sprouse's testimony that the envelope Foster left for Jim Johnson contained $300 in $20 bills and discredit Foster's and Jim Johnson's claims to the contrary. I also discredit Foster's claim that he was not aware of WUE at the time. I infer that Foster falsely told Sprouse that the envelope contained coupons to conceal the fact that Foster was using that means for delivering cash to Jim Johnson to finance the procompany WUE surreptitiously.

I therefore find, as alleged in the complaint, that the Company provided unlawful assistance to WUE by providing it with money, in violation of Section 8(a)(1).

b. *Furnishing letterhead paper*

About a week after President Foster gave Sprouse the envelope containing $300 in cash for him to deliver to Jim Johnson, Sprouse received in his mailbox a package with a post-a-note on it labeled ''Jim Johnson'' in Vice President Baum's handwriting. Sprouse looked inside the package and saw about 50 sheets of paper bearing the WUE letterhead. (Tr. 161, 178–180, 188–189.) I discredit Baum's denial that he ''ever sent any packages or envelopes to Jim Johnson'' (Tr. 1268).

Based on Sprouse's credited testimony I find, as alleged in the complaint, that the Company provided unlawful assistance to WUE by providing it with stationery, in violation of Section 8(a)(1).

Also contrary to the Company's contention in its brief (at 39) that Jim Johnson conducted the activities of WUE ''entirely on his own'' and contrary to Baum's denials (Tr. 1285–1286), Dan Johnson credibly testified (Tr. 90–91):

> Q. Did you ever have any conversation with Mr. Baum about Jimmy Johnson?
>
> A. Well, Mr. Baum told me one day that Jim Johnson wouldn't be in because . . . Jim Johnson was talking with Mr. Potts and Mr. Baum about this union problem [emphasis added].
>
> Q. . . . Did he say when he would be in?
>
> A. He said, ''Don't worry about him come in tonight, he's been with us most of the day.'' And he says, ''We'll take care of his time and he'll be in the next day.''

c. *WUE soliciting on company time*

(1) Admitted company knowledge

Despite its surveillance of union supporters to enforce its no-solicitation rule, as discussed below, the Company was permitting WUE supporters to solicit for Workers United with Employer during working time.

In early February, as Security Site Manager Sprouse credibly testified (Tr. 163, 189), he observed employee Columbus ''Bo'' Tomblin in the cleaning department with a ''clipboard full of these applications that he was having people sign'' while they were working, ''pledging allegiance to the WUE.'' Tomblin did not testify.

General Superintendent Potts had instructed Sprouse to ''keep an eye'' on the union supporters named in Vice President Baum's forged ''Your Leaders'' union notice (Tr. 156), but had said nothing about watching the WUE supporters.

Similarly, electrician William Nieves observed Tomblin in the cleaning department work area, circulating what Nieves thought was a WUE petition, ''try[ing] to get people to sign the petition to eliminate the threat of the union, saying that they did not want a union in their foundry'' (Tr. 569–570).

Operator Robert Bunting, who worked with Jim Johnson, observed Johnson going around with a clipboard with printed WUE papers that ''he gave out to people.'' Johnson did this not only in the lunchroom and on breaks, but also in the plant. As Bunting credibly testified, Johnson would come back from break with his WUE information 5–10 minutes late ''when the rest of us was already back'' and would ''try and get some of the guys in the shakeout'' to sign the document. (Tr. 1076–1077.)

On cross-examination Bunting credibly confirmed that he saw Jim Johnson ''talking to people with his [WUE] information'' during working time. Johnson ''wouldn't give a piece of paper to anyone who wouldn't sign.'' (Tr. 1124.)

Bunting observed that General Foreman Dan Johnson permitted Jim Johnson to solicit for WUE during working time and ''never said anything to him'' about it (Tr. 1077). This occurred, as discussed below, when Dan Johnson was under orders to ''keep an eye'' on union supporters and, if he found any of them organizing in the plant, to ''suspend them and let the front office deal with it.''

Jim Johnson testified that Bo Tomblin assisted him circulate the WUE papers. Jim Johnson conceded that he had a clipboard, but claimed that he kept it inside a bag at work and denied ever soliciting any signatures during worktime. He also denied remembering any supervisor having talked to him about solicitation at that time. (Tr. 1475–1476, 1538–1539.) I discredit both denials. He did not appear on the stand to be a truthful witness.

During the Region's investigation of this case, the Company freely admitted that it had knowledge of WUE's violation of the no-solicitation rule. In the Company's December 21 position statement (signed by its attorney at that time), the Company not only admitted that Jim Johnson and Bo Tomblin were ''observed violating'' the no-solicitation policy, but also represented that they were ''verbally warned'' for doing so, ''along with'' union supporters.

The Company's December 21 position statement represents in part (Tr. 2078–2080) that after the Company posted the no-solicitation rule,

> all employees that were subsequently *observed violating* the Company's longstanding no-solicitation policy were issued a verbal warning concerning the policy.
>
> For example, *Jim Johnson and Bo Tomblin*, who according to the Board, are leaders in the WUE, *were verbally warned concerning violating the policy, along with* the other employees and alleged [union] supporters.
>
> *All employees were treated the same*, regardless of what it may have been that they were soliciting for. And no employee was threatened or disciplined in any manner, other than a verbal warning. [Emphasis added.]

This admission of company knowledge belies Vice President Baum's denial at the trial that he was ever ''made aware of any WUE solicitations on work time'' that February and March (Tr. 1295).

(2) Shifting positions

By the time of trial in May 1994, the Company had shifted its position.

On March 28, 1994, the Company modified its December 21, 1993 position statement. This 1994 position statement, signed by its trial counsel (Tr. 948–949), omits the Company's admission that WUE organizers Jim Johnson and Bo Tomblin were ''observed violating'' the no-solicitation policy and also omits the representation that they were ''verbally warned'' for doing so, ''along with'' union supporters. Instead, it asserts in part:

> At the time [March 1993] a number of employees received verbal warnings for violating the no-solicitation policy including union supporters and other employees. During the same time, the Company also *verbally counseled* Jim Johnson and Bo Tomblin. [Emphasis added.]

When called as an adverse witness, Vice President Baum testified (Tr. 949–950):

> A. I did not bring [Jim Johnson] in. I saw him in the shop. And I said, ''Mr. Johnson, I want to just tell you that we cannot allow any solicitation. I have not received any [complaints] but I want to tell you ahead of time.''
>
> . . . .
>
> Q. . . . Nobody had come to you and told you that Jimmy Johnson was soliciting on company time?
>
> A. No, sir.
>
> Q. Okay. But you decided out of the blue to go talk to him?
>
> A. Yes, sir.

It was on direct examination when recalled as a defense witness that Baum unequivocally denied that he was ever ''made aware of any WUE solicitations on work time'' that February and March (Tr. 1295).

On further questioning by company counsel, Baum testified (Tr. 1301):

> Q. [By Stephen Sferra] And in March of 1993, did you have any discussions with Jim Johnson regarding WUE solicitations?
>
> A. Yes, sir.
>
> Q. And what was the nature of that discussion with Mr. Jim Johnson?
>
> A. I mentioned both to Jim Johnson and to Bo Tomblin that we had issued verbal warning for solicitation, I hadn't received any [complaints] on them, but I was giving them fair warning that we would not permit any solicitations on work time.
>
> . . . .
>
> Q. Why did you give them that warning?
>
> A. I just felt that it was what we wanted to do. We didn't want any problems.
>
> Q. Was that the equivalent of . . . the verbal warnings that were issued to these four individuals [William Nieves, Robert Bunting, Steve Porter, and another employee on March 24]?
>
> A. No.

Baum did not retract the denial that he was ever ''made aware of any WUE solicitations on work time,'' even on cross-examination after he read into the record (Tr. 2078–2081) the above-quoted December 21 position statement in which the Company admitted that Jim Johnson and Bo Tomblin were ''observed violating'' the no-solicitation policy.

I deem the admission in the December 21 position statement of company knowledge of Jim Johnson's and Bo Tomblin's violation of the no-solicitation policy to be more persuasive than Vice President Baum's denial. From his demeanor on the stand, Baum did not impress me as being a candid witness. I discredit his denial that he was aware that Johnson and Tomblin were soliciting for WUE during working time (by denying awareness of ''any WUE solicitations on work time'' that February and March).

(3) Permitted WUE violations of no-solicitation rule

Whether Vice President Baum ''verbally warned'' Jim Johnson and Bo Tomblin for their worktime WUE solicitation (as represented in the December 21 position statement during the Region's investigation of this case) or ''verbally counseled'' them (as represented in the 1994 position statement in preparation for trial), the evidence is clear that the Company took neither action until late March 1993 when, without any investigation, it relied on complaints by antiunion employees and gave ''verbal warnings'' to union organizers.

Baum on March 24 called union organizers William Nieves, Robert Bunting, and Steven ''Steve'' Porter individually into his office, as discussed later, and read to each of them a statement (R. Exh. 17), threatening that ''If we have any more reports of *any* solicitation and/or harassment you will be terminated.''

In contrast, as he belatedly admitted (Tr. 2081), Baum merely ''talked'' to Johnson and Tomblin to ''give them fair warning, that we did not want them soliciting on working time.''

The next year, after the Union renewed its stalled organizing drive, the Company gave union organizer Steve Porter a 1-week suspension for ''[i]llegal solicitation and/or harassment of other employees during working hours'' (G.C. Exh. 27). Then, in response to a written complaint (G.C. Exh. 29) that Jim Johnson was repeatedly soliciting for WUE on company time, the Company merely gave him a verbal warning (G.C. Exh. 30), similar to the prior verbal warnings to Steve Porter and other union organizers (R. Exh. 17).

Baum testified (Tr. 947) that he did not also suspend Jim Johnson as he did Steve Porter because

> This was the first time for Mr. Johnson. And the first time that Mr. Porter was warned, I had received several complaints. I gave this warning to Mr. Johnson after one complaint.

(4) Concluding findings

I find that the Company took shifting positions to conceal its disparate enforcement of the no-solicitation rule in further assisting the procompany WUE.

As found, the Company was aware in March 1993, when it ''verbally warned'' union organizers and threatened termination, that Jim Johnson and Bo Tomblin had been violating the no-solicitation rule. It needed no employee complaints to substantiate the violations because, as it admitted in its December 21 position statement, Johnson and Tomblin were ''observed violating'' the policy.

There is nothing in the no-solicitation rule that requires employee complaints before it is enforceable. The rule (G.C. Exh. 13), entitled ''Solicitations,'' reads:

> No person is permitted to solicit any employee or other person for any purpose during the paid working time of the person soliciting or being solicited. This includes talking which interferes with effective production. Employees are not permitted to distribute any literature, handbills, or other written or printed material in working areas of the plant or in any area during their working time.

The record is clear that in seeking a dismissal of the charge, the Company made the false representation in its December 21 position statement to the Region that it had ''verbally warned'' Jim Johnson and Bo Tomblin ''concerning violating the [no-solicitation policy], along with'' the union supporters and that ''All employees were treated the same.''

Before trial, in the absence of any record of a warning in either Johnson's or Tomblin's personnel file, the Company modified its position statement to admit, in effect, that the WUE and union organizers were not treated the same.

Then at the trial, the Company further shifted its position, fabricating the claim that it was not ''aware of any WUE solicitations on work time.'' In light of the previously admitted company knowledge of their violating the no-solicitation policy, I reject the claim as untenable.

I therefore find, as alleged in the complaint, that by disparate enforcement of the no-solicitation rule, the Company coerced employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

D. *Actions Against Union Supporters*

1. An insider's view

a. *Dan Johnson's credibility*

As discussed above, former General Foreman Dan Johnson revealed his insider view of what the Company, before his March 5 discharge, was doing to undercut the union organizing campaign.

As found, General Superintendent Potts had him distribute the forged ''Your Leaders'' union notice. Vice President Baum had him give copies of Baum's form return-card request to employee Ward for distribution to employees. Dan Johnson corroborated, in part, Security Site Manager Sprouse's testimony about President Foster's cash being delivered to apprentice molder Jim Johnson, founder of WUE, the procompany Workers United with Employer. Baum told Dan Johnson on one occasion that Baum and Potts had been meeting with Jim Johnson about the ''union problem'' most of the day and that Johnson would not be in to work—indicating the Company's collaboration with WUE in the antiunion campaign.

In addition, Dan Johnson testified about (a) the Company's instructions to engage in surveillance of union supporters and to enforce the no-solicitation rule against employees soliciting for the Union, (b) its elimination of overtime as a reprisal for union activity, and (c) its plan to discriminate against the principal union supporters in an effort to rid them from the plant.

In response, the Company vigorously challenges Dan Johnson's credibility. In its brief (at 13, 18, 20) it describes his testimony as ''tainted, incredible,'' as ''unsubstantiated musings'' of a ''disgruntled'' former employee, and as ''biased'' and ''not believable.''

Baum admitted, however, that although Dan Johnson was ''hurt'' when Potts discharged him on March 5, ''it was a fairly cordial parting'' (Tr. 1316). Johnson did not disclose either to the Union or the NLRB Regional Office any of the insider information he had received as general foreman until 8 months later when, on November 19, he gave his pretrial affidavit.

On cross-examination, Dan Johnson explained the delay (Tr. 121–124):

> Q. Why did you take so long to come forward with all of this evidence of misconduct by Mr. Baum and Mr. Potts?
>
> A. . . . I just felt that it was a great burden on me. And I got back into going to church and I had talked to my reverend . . . and I told him what I had done, told him what the Elyria Foundry had done to me. . . . and he told me that I'd be doing the right thing whatever my decision because I told him that I was thinking about calling [the Union] up [and the NLRB] . . . and I just needed this stuff off my chest. And once I did, I felt a lot better about myself, knowing that I . . . did wrong.
>
> . . . .
>
> Q. So you *got religion* [emphasis added] and you decided to come forward with this?
>
> A. I've been religious all the time but I haven't been back to church all the time and . . . I needed to . . . talk to somebody.
>
> . . . .
>
> A. I just wanted to get off [my] chest that I was the person that handed these papers [the forged union notice] out and I just wanted to tell them that I did wrong.

The Company in its brief (at 21) ridicules Johnson's assertion that he ''decided to report the misconduct supposedly directed by Potts and Baum'' only after he quite literally ''got religion.'' It contends his ''excuse for waiting until November 1993 to do so is preposterous.'' I disagree.

Dan Johnson impressed me on the stand as a most sincere, truthful witness, doing his best to recount accurately what occurred. I credit his testimony over the denials by company witnesses.

b. *Dan Johnson's insider view*

On January 21, upon hearing about the organizing campaign (Tr. 79–80), Vice President Baum instructed the security site manager, David Sprouse, to post throughout the plant the Company's no-solicitation rule from the employee handbook (Tr. 117, 154, 1287; R. Exh. 5, p. 15).

The next day, January 22, General Superintendent Potts called General Foreman Dan Johnson into his office. Johnson was serving as plant superintendent on the afternoon and night shifts. As Dan Johnson credibly testified, Potts told him that this (union) organizing ''stuff was being stirred'' on the afternoon shift, that ''if I find out anything is going on . . . to more or less take care of it whatever it takes.'' Potts instructed that ''if anybody was giving me any problems . . . suspend them and let the front office deal with it.'' Potts said to ''just more or less bird dog the people at the plant,'' referring to ''[union] organizing out there in the plant.'' (Tr. 79, 81–82, 484, 574.) Potts later told him that Potts found out the Union started in maintenance (Tr. 146). Potts did not deny Dan Johnson's testimony.

Almost every day or two after that, as Dan Johnson further testified, Potts told him there were ''certain people out there to look for and keep an eye on. And if there's anything possible to get rid of them.'' Among others, Potts specifically mentioned Robert Bunting (listed as shop steward on the forged union notice of ''Your Leaders''), Rickie Porter (Steve Porter's brother), and William Nieves (listed as president of the Union on the forged notice). Potts said Johnson ''didn't have to worry'' about Nieves so much because he was on the day shift, but ''if I was there on weekends . . . keep an eye on him. . . . [Potts] was just giving me a different list of people to more or less keep an eye on all the time.'' (Tr. 86–87.)

Dan Johnson credibly testified (Tr. 147–148) that Potts informed him why Potts said to ''put the hammer'' to these employees. Potts told him that ''because they were behind the UAW [the Company] *didn't want that kind of people in there* [emphasis added].''

Dan Johnson also credibly testified (Tr. 87–88):

> Q. Now, how often . . . did you have these conversations with [Potts]?
>
> A. Well, I got to a point to where I'd start coming in and going back to the melt shop and try to avoid him. And he'd be calling me still and told me like, for example, ''Buzz [Robert] Bunting . . . keep an eye on him because we know he's behind the union thing.'' Or, Rickie Porter, whatever I could [do] to him . . . *if I see anybody organizing out in the plant, to suspend them . . . the front office [will] take care of them*. [Emphasis added.]
>
> . . . .
>
> A. . . . I more or less was floating between the three plants so I kept an eye on everybody they ever told me to keep an eye on as much as possible.

Dan Johnson discussed Potts' instructions with Melting Supervisor William Hensel, who ''knew what Mr. Potts was putting me up to . . . . and he just couldn't believe what they wanted me to do.'' (Tr. 88–89.) ''He didn't want to have'' any part in the Company's plan (Tr. 112). Hensel claimed that he did not remember any conversations with Johnson about surveillance (Tr. 1848). I discuss his credibility later.

Johnson also had conversations with Maintenance General Foreman James Ellison. On one occasion, upon returning from the front office, Ellison told Johnson ''They were more or less jumping down his throat because they found out mainly the Union started in his department.'' Johnson asked ''what they were doing'' to Ellison, who replied, ''This union problem, I'm not going to lose my job over it . . . I'm going to hire more people and cut all the overtime down. . . . I'll take care of these guys.'' (Tr. 89.) Regarding the cut in overtime, Ellison told Johnson that ''he was going to hurt them where it hurts the most,'' in their pocketbook (Tr. 112, 148).

Later, when Dan Johnson and Ellison were talking about a problem with employees concerning the Union, Ellison would ''bring up Steve Porter and Bill Nieves'' (Tr. 90). I note that President Foster testified that ''The earliest people that I knew were involved [in the Union] were Nieves, [Steve] Porter, [and] Bunting'' (Tr. 69).

Concerning the late January meeting in which the Company instructed supervisors on the do's and don'ts for conducting themselves during the union organizing campaign (Tr. 1262–1263), Dan Johnson credibly testified (Tr. 148–149):

> Q. Okay. Now—but it's your testimony that after that meeting . . . Potts told you to put the hammer [to] and watch these people, is that correct?
>
> A. Yes, he did. *He stated one thing in that meeting and then he stated another thing afterwards*. [Emphasis added.]

After Dan Johnson was discharged on March 5, the Company discharged employee Rickie Porter. On cross-examination Johnson credibly testified that when he was looking for another job, he telephoned Supervisor Hensel about using Hensel as a reference. In that conversation (Tr. 130–131) ''[Hensel] said *he finally got Rickie Porter*, that he went home early, something like that, and they released him for not doing his job. [Emphasis added.]''

Hensel admitted that Johnson called and asked for a reference, but denied any conversation about Rickie Porter's termination (Tr. 1849–1850). I discredit the denial. As discussed later, Hensel impressed me as a most untrustworthy witness.

2. Surveillance of union supporters

The complaint alleges that the Company engaged in unlawful surveillance of its employees who supported or who it believed supported the Union.

Security Site Manager Sprouse gave credited, undenied testimony that Potts instructed him to ''keep an eye'' on the employees named on the forged ''Your Leaders'' union notice (G.C. Exh. 11), specifically naming the Porter brothers (Steve and Rickie), and to ''cause some sort of intimidation by being visible to them.'' Sprouse complied with these instructions and ''would patrol near them when possible and keep my eye on them.'' Every ''couple of days or so'' Potts would ask if he knew any further developments in union activity and ''would go over the same names and just let me know that I had to watch them.'' (Tr. 155–157.)

Electrician Nieves (who was listed on the forged notice as ''President'' of the Union) credibly testified ''I knew we were being watched.'' He remembered that ''[w]henever I went into a work area to do a job,'' either WUE members or the department boss—particularly No. 3 Foundry Foreman Alex Kasubienski (who did not testify)—would come ''close to me or to whoever was with me or whoever was conversing with me'' and watch ''every move I'd make . . . intimidating or humiliating in a way'' and limiting his ''ability to perform your work.'' (Tr. 571–573.)

As Nieves further testified (Tr. 573), Dan Johnson would ''step right in between you when you were talking to someone just to hear what you were saying. ''[Supervisor Robert] Rob Johnson also did [this] in the maintenance area. A few of us would be talking about anything, about a job, washing our hands, ready to go home, whatever, and he would come and he would stand right there. . . . right between us.'' When testifying, Rob Johnson did not deny this testimony.

Millwright Steve Porter (listed on the forged notice as ''Treasurer'') credibly testified that after the list of ''Your Leaders'' was brought out, ''Every time we was called or put on a job there seemed to be a supervisor there or one of their leadmen.'' For ''instance, I was talking to a coworker—and I do this all the time—and one of the foremen [Steve Parks] told me to get his telephone number and call him at home.'' (Tr. 842.)

As Steve Porter further testified, it was after that list appeared that the foremen ''really started giving us a rough time.'' When Steve Porter was working on a job in the No. 3 foundry, Foreman Kasubienski ''more or less put a time limit on the job, said it shouldn't take me no more than an hour, hour-and-a-half, which I don't know how he can understand what it would take because he is not a millwright.'' (Tr. 843.)

Shakeout man Daniel Oestreicher is Robert Bunting's brother-in-law (Tr. 979). President Foster name him as one of the five employees—along with Nieves, Bunting, and Rickie and Steve Porter—who were identified ''All along the way'' as the principal union organizers (Tr. 67–68). Oestreicher credibly testified that on one occasion, his crane operator notified him that a ''white hat'' was watching him. He then noticed that Shakeout Foreman Carmelo Rivera had been ''hiding in the corners watching me work.'' (Tr. 981.)

As elicited on cross-examination, the crane operator said, ''Look. He is back there behind the elevator hiding.'' Another employee came up and asked Rivera, ''Why don't you be a man and go out there and stand out and be obvious that you are watching him instead of hiding in the corner?'' (Tr. 992.) Rivera did not testify. This credited and undisputed testimony reveals that the surveillance was obvious to the employees.

Vice President Baum—but not General Superintendent Potts, who also testified—denied that he directed either Dan Johnson or Carmelo Rivera to engage in surveillance of employees. As found, it was Potts not Baum who instructed Dan Johnson to ''keep an eye on the people'' and to suspend anybody caught organizing for the Union.

The Company contends in its brief (at 14) that the supervisors were doing nothing more than ''lawfully watching their workers in the normal course of supervision.'' I disagree and find that the Company engaged in coercive surveillance, violating Section 8(a)(1).

3. Threats to terminate union organizers

a. *After photograph in newspaper*

As indicated above, President Foster named union organizers Nieves, Steve Porter, and Bunting as the ''earliest people that I knew were involved'' in the Union (Tr. 69). On March 24, Vice President Baum called them individually into his office. He testified that he read to each of them a statement entitled, ''Statement Read to Solicitation Violators,'' and ''At the end of the prepared statement'' said, ''This is the end of the meeting.'' He placed a copy of the statement in each of their files, without giving them a copy. (Tr. 1297.)

The termination threat (R. Exh. 17) read:

> We have received numerous reports from several people—of illegal solicitation and/or harassment. The long established rule against solicitation has been posted, and is known to all.
>
> We have legal grounds to terminate you at this time, but we are not going to do it.
>
> It is our intent to give you every benefit of the doubt and to deal with each individual with tolerance and compassion.

> However—If we have any more reports of *any* solicitation and/or harassment you will be terminated. [Emphasis in original.]

The day before, March 23, there appeared on the front business page of a local newspaper (G.C. Exh. 6) a four-column picture of the organizers, over the caption:

> UNION FIGHT—Robert Bunting, Steve Porter, and William Nieves from the Elyria Foundry said the company is trying to intimidate them into giving up their unionization bid. Company officials have denied the accusation.

The photograph was under a banner headline, ''UNION THREAT PLAGUES FOUNDRY.'' The accompanying six-column story about the pending NLRB investigation contains complaints by the three organizers against the Company. The story quotes Vice President Baum as stating that ''There has been no intimidation'' and ''This is probably an unhappy little group who is trying to mislead the newspaper the way it misled our workers.''

b. *Supporting evidence*

In support of the threats of termination, the Company introduced into evidence one unsigned and eight signed statements that the Company had typed (R. Exh. 15). Two of the nine statements (pp. 8–9) are dated March 25—the day *after* the three union organizers were threatened with termination (and therefore not signed when Baum threatened the three union organizers with termination). One of these two March 25 statements is signed by WUE organizer Bo Tomblin and the other, witnessed by Tomblin, is against another employee, Richard Moran, who was also threatened with termination, although the actual date of the threat is in doubt (Tr. 1297).

One of the remaining seven complaints that were obtained before Baum threatened to terminate the three organizers was a complaint by employee Jeff Grimm (p. 3) who alleged name-calling—not by any of the three organizers but by two other employees, Jimmy Golden and Thurman Radford, who were *not* threatened with termination. Concerning this typed complaint, Baum testified on cross-examination (Tr. 1400–1401):

> Q. These were the two employees that were making those statements [''like 'suck a—' and 'a— hole'''] to [Grimm]?
> A. Yes.
> Q. Did those two people ever get written up?
> A. No.
> Q. Why not?
> A. I don't know, they just were not written up.

Among the remaining six complaints, the only one naming Nieves (p. 4) concerns his soliciting for the Union on February 9, 6 weeks earlier, ''outside the lunchroom''—without alleging that this occurred during working time.

The only complaint accusing Bunting of engaging in union solicitation (p. 6) is dated March 18—again without alleging working time. Three other complaints against him (R. Exh. 15 pp. 1, 5, 7; R. Exh. 16), dated January 26 and March 9 and 20, involve name-calling.

The only one alleging worktime solicitation (p. 5) is dated March 9. It states that Steve Porter approached the complaining employee ''during my worktime'' to ''ask if I needed a card'' and telling him ''how I could get better wages, benefits, and a lot more with the Union.'' The one other complaint against Steve Porter (p. 2) is dated February 2, 7 weeks before the termination threats. It alleges name-calling and shop talk (''kicking some ass'').

Thus, among these six complaints, each of the three threatened union organizers was accused of soliciting for the Union a *single* time (Nieves on February 9, Steve Porter on March 9, and Bunting on March 18), and only Porter was accused of doing so during working time.

Baum testified (Tr. 1288) that dozens of people ''reported to me that there were people in the shop who were attempting to solicit them during the time that they were working, lunch time, break time, after break, while they were working within the shop.'' He testified (Tr. 1266) that he told complaining employees to ''[r]educe it to writing and bring it in to me and if you are willing to sign it, I will accept it as a complaint.'' He added (Tr. 1289) that ''[i]f the complaints weren't in writing I consider that to be nothing more than a rumor or hearsay.''

Explaining the procedure he followed, Baum testified (Tr. 1292–1293):

> Generally [the statements] were signed right then as soon as I had them typed. If they came in to see me at 8 o'clock in the morning and said, I have a complaint to make, I said, okay, fine. I would sit down if they did not have it in writing, I would write it in longhand and read it to them and say, is this your complaint? Yes. And I will type it up later today, stop back and if that is your statement, then sign it. . . . They would dictate it to me.

Baum testified that after the complaints were typed and signed (Tr. 1289, 1402):

> A. I put them in my file.
> . . . .
> Q. Now did you ever conduct any investigation into the matter after these people gave you these statements?
> . . . .
> A. This was the investigation.
> . . . .
> Q. You never asked those individuals whether or not this, in fact, was true; is that correct?
> A. Which individuals?
> Q. The individuals that were accused of doing the soliciting?
> A. No. No, I did not.

Baum admitted (Tr. 1402) that ''[n]o foreman came and told [him] they saw'' any union soliciting during working time.

b. *Contentions and concluding findings*

The complaint alleges that the Company threatened the employees with termination because of their activities and support for the union.

The Company contends in its brief (at 59) that its March 24 issuance of ''verbal warnings'' to Nieves, Steve Porter,

Bunting, and Moran ''does not evidence disparate enforcement of the Company's no-solicitation policy.''

To the contrary, as found, the Company had been permitting WUE organizers Jim Johnson and Bo Tomblin to solicit during working time. Yet it now admits that after warning the union organizers (threatening them with termination), it did not threaten the WUE organizers with termination, but merely ''talked'' to them, giving them ''fair warning, that we did not want them soliciting on working time.''

The Company contends (at 59) that the verbal warnings were not arbitrary and that the union organizers were selected for discipline because they were the subjects of ''multiple written complaints'' from coworkers for their repeated violations of the ''working time'' solicitation rule.

This contention misrepresents the record. As found, before the March 24 threats of termination, the Company had only a *single* written complaint against each of the three union organizers Nieves, Steve Porter, and Bunting for engaging in union solicitation. Only one of the written complaints referred to worktime solicitation.

The Company argues (at 59–60):

> Nor is there any merit to the General Counsel's suggestion that the verbal warnings were motivated by Nieves, Porter, and Bunting's photo in a local paper on March 23, 1993. . . . That theory fails to account for the identical warning issued to Moran, and the undisputed fact that the written complaints compiled by Baum predated the newspaper article.

The Company has failed to suggest a nondiscriminatory explanation for the timing of the termination threats to the union organizers 1 day after the newspaper photograph was published under the banner headline, ''UNION THREAT PLAGUES FOUNDRY.'' There had been only one written complaint about worktime union solicitation and that was over 2 weeks before the March 24 threats.

Baum testified (Tr. 1404) that the Company determined that ''we had legal grounds to terminate'' the three organizers for violating the no-solicitation rule, but that the Company made the decision not to do so ''in conjunction with our legal counsel.'' I discredit Baum's denial (Tr. 1299) that the photograph had ''anything to do with [his] decision to issue these warnings.''

Concerning the warning given to employee Moran, the written complaint alleging that he engaged in worktime solicitation is dated the following day, March 25, and signed by WUE organizer Bo Tomblin. Although Moran's warning is dated March 24, Moran did not testify and there is no substantiation of Baum's claim (Tr. 1297) that the March 24 date on the warning is correct.

I deem it likely that the termination threat to Moran was an afterthought (supported by WUE organizer Tomblin's March 25 written complaint, the only complaint against Moran), if not a deliberate attempt (by placing a March 24 date, the day before, on Moran's warning) to conceal the Company's discriminatory motive for threatening to terminate the three outspoken and publicized union organizers.

Moreover, I find that the manner in which the Company handled the written complaints from antiunion employees indicates a discriminatory motivation. The Company did not investigate any of the complaints, did not ask the accused employees whether they were violating the no-solicitation rule, and did not caution or warn them at the time. Baum admitted (Tr. 1403) that he had never disciplined anybody before for solicitation.

Particularly in view of the Company's earlier instructions to General Foreman Dan Johnson to do ''anything possible to get rid'' of certain union organizers, I find that the Company was keeping the file of written complaints in secret as a way to build a case against the union organizers in the hope of ridding them from the plant.

Evidently because of the dearth of written complaints of union solicitation (only one for each of the three union organizers over a 2-month period from late January to late March), the Company added ''and/or harassment'' to its prepared ''Statement Read to Solicitation Violators,'' even though there is nothing in the no-solicitation rule about harassment. Then at the trial, the Company included some name-calling complaints to support the threats of termination. As found, it had no explanation for not writing up other employees who were also accused of name-calling.

The Company further argues in its brief (at 61) that ''the warnings were merely the first step of a progressive discipline.'' The warnings, however, clearly state, ''If we have any more reports of *any* solicitation and/or harassment you will be terminated.'' Clearly, they are explicit final warnings—not only for worktime solicitation, but also for *any* solicitation or for ''harassment,'' which could be construed as repeated lunchtime or breaktime solicitation.

Contrary to the Company's contention (at 60) that as evidenced by the plain language, ''the subject warnings cannot be reasonably be construed as a threat of termination based on union support,'' I find that the evidence is clear that the Company threatened the employees with termination because of their activities and support for the Union, violating Section 8(a)(1).

4. Suspension of Steve Porter

The union organizing drive stalled after the Company discharged electrician Nieves in August 1993 (Tr. 876). When the Union renewed the campaign around the first of 1994, the Company followed the same procedure as the year before to build a case again against Steve Porter for worktime solicitation and included an affidavit to bolster the case.

This time it did so with the cooperation of WUE supporter Jeffery Wohlever, who had been a supervisor at his prior place of employment and who had mentioned ''I wouldn't mind being a supervisor'' (Tr. 2030).

Wohlever gave much conflicting testimony concerning his claim that Steve Porter solicited him four times on December 29, January 15 and 18, and February 2, 1994. Before claiming that Porter first solicited him on December 29, Wohlever testified (Tr. 2002):

> Q. . . . And did you submit a written statement [to the Company]?
>
> A. Yes, I did.
>
> Q. All right. And why did you document that solicitation?
>
> A. Because being a former supervisor, I knew that the date and times would be important, in the event that the Company should have to have them.

At one point Wohlever testified that he first talked to President Foster and Vice President Baum about Porter's soliciting him ''the first part of January.'' Upon further questioning by company counsel, he claimed that he saw them after the January 15 solicitation. Upon still further questioning, he claimed he saw them after the January 18 solicitation. (Tr. 2023–2024.)

Wohlever testified that he went to Foster's office and asked to speak to him, then met with Foster and Baum. Regarding his signing an affidavit, Wohlever testified (Tr. 2041) that:

> This was brought out in our first meeting. . . . When I talked with them about the situation, they told me that I needed to put it in writing, and that I . . . would be asked to sign an affidavit for the Company.

Wohlever later testified (Tr. 2045–2046) the first time anybody said anything to him about his signing the affidavit was he believed in the latter part of February when General Superintendent Potts told him that ''the Company was going to take the position with Mr. Porter on soliciting'' and asked ''would I sign an affidavit for the Company?'' He signed the affidavit (R. Exh. 49) on March 1, 1994, the day after Steve Porter's suspension.

Wohlever conceded that he signed a petition for WUE at the lunch table back in 1993 when Steve Porter was sitting there and that he was ''totally'' for WUE. When asked why he did not tell Porter in December that he was not interested, he answered: ''Because I just wanted to hear what he had to say as to what was going on.'' (Tr. 2032–2034.) He conceded that after that, ''I just kept trying to tell him that I was thinking about it'' (Tr. 2038).

This testimony reveals that while he was conferring with the company officials and submitting written complaints to the Company, he was cooperating with the Company in building a case against Porter.

Elsewhere in his testimony he claimed (Tr. 2025) that he explained to Foster and Baum what was going on and ''asked them what I could do to have [the soliciting] stopped.'' He also claimed that when he went to them the ''first time and second time'' and submitted written statements (R. Exhs. 50, 51), he did so ''[b]ecause I was tired of being harassed to turn a card in to join the Union.'' He claimed he wanted the Company to ''just basically put a stop to it, to just talk to [Porter] and tell him to just leave me alone.'' Wohlever appeared on the stand to be willing to give any testimony that might help the Company's cause.

Even apart from the fact that Wohlever appeared to be a most untrustworthy witness, I find that the Company was primarily interested in building a case against Steve Porter, not enforcing the no-solicitation rule. Without saying anything to Porter, it waited until February 28, 1994, and gave him a 1-week suspension, from March 1 through 7, for ''Illegal solicitation and/or harassment of other employees during working hours'' (G.C. Exh. 27; Tr. 874–875, 2075–2077).

I find that the Company suspended Steve Porter on February 28, 1994—as it had threatened on March 24, 1993, to terminate him—because of his activities and support for the Union. I therefore find that the 1-week suspension violated Section 8(a)(3) and (1).

5. Discharge of Rickie Porter

a. *Porter's leaving and Charlton's working alone*

Before his support of the Union, Rickie Porter had an unblemished record at the Company. Employed since 1987, he had perfect attendance, not missing a single day. His last annual perfect-attendance award was $1000. He had received no warnings. (Tr 230–232.)

President Foster, who played an active role in opposing the Union, admitted his knowledge that Rickie Porter was one of a small group of employees who were identified ''All along the way'' as the principal union organizers (Tr. 67–68).

As found, General Foreman Dan Johnson gave credited, undenied testimony that Rickie Porter was one of the employees (along with William Nieves and Robert Bunting) whom General Superintendent Potts said to ''keep an eye on'' and ''if there's anything possible to get rid of them.'' As further found, Security Site Manager Sprouse gave credited, undenied testimony that Potts instructed him ''to keep an eye'' on certain employees, including Rickie Porter (in the Company's surveillance of union supporters).

Later, as further found, when Dan Johnson was asking Supervisor Hensel to be a reference for him, Hensel said ''he finally got Rickie Porter,'' stating that they released him for going home early and not doing his job.

The opportunity came when Rickie Porter's son had been missing 4 days from home and school. Thinking that his son was running around with the wrong group, Rickie Porter wanted to search for him after work on Saturday morning, March 13. (Tr. 240–241.)

Rickie Porter worked in the melt shop, operating a crane and charging furnaces. He worked on a two-man crew on the third (11 p.m. to 7:18 a.m.) shift with Group Leader (Leadman) Bradley Charlton, who was in charge of the melt shop on that shift (Tr. 230, 239, 356, 481, 484, 1552). Charlton had signed a union authorization card, but had gone to the Union and retrieved it after President Foster threatened to sell the plant (G.C. Exh. 18).

Early that Saturday morning, March 13, about 1:45 or 2 o'clock, as he credibly testified, Rickie Porter told Charlton about the personal problem at home with his son and that he was leaving at 7:18 after working his 8 hours. Charlton did not object. Rickie Porter clocked out at 7:18 a.m. (0731 hours) and found his son at Grafton. (Tr. 240–241, 244; G.C. Exh. 20; R. Exh. 34.)

Before Rickie Porter left work that Saturday morning, he and Charlton were cleaning underneath one of the furnaces and his brother, millwright Steve Porter, operated the 5-ton overhead crane for them. When Rickie Porter left, Steve Porter was still there, waiting to help install an inductor on the No. 3 furnace. He was experienced in assisting in the charging of furnaces and was available to assist Charlton in adding any additional charges required that morning. The practice on Saturday mornings was for the third-shift to completely charge the furnaces. (Tr. 242, 350, 378, 380, 1636–1638, 2581–2582.)

After Rickie Porter left, Steve Porter was watching when Charlton entered the overhead crane and proceeded to make another charge (Tr. 1640–1641). When Charlton finished this first of three additional charges that morning, as Charlton concedes (Tr. 1585):

> Steve had come over and looked up at me like wanting to know if I was done and I motioned yes and he closed the lid and then he looked up again like wanting to know if I wanted another furnace open and I told him no because I had not taken a chemistry on it yet.

Later that morning, Charlton proceeded to make the two other charges alone, using the 10-ton floor crane. (Charlton conceded on cross-examination that the 10-ton crane was ''more dangerous'' than the overhead crane.) Steve Porter was available to assist him, as were two other maintenance employees who had come to the melt shop to work that day and had left their equipment, waiting for the charges to be completed. Charlton, however, made the two charges alone without asking for any help. (Tr. 378–380, 1587–1588, 1590, 1592, 1629–1630, 1635–1643.)

Melting Supervisor Hensel was aware that the maintenance employees were scheduled to install the inductor on the No. 3 furnace that Saturday morning after the furnaces were charged. When asked on cross-examination if the maintenance employees ''were going to put the inductor in then on Saturday morning,'' he was obviously reluctant to admit it. His answer was: ''I would imagine so.'' (Tr. 1885.) Maintenance General Foreman James Ellison, however, later admitted (Tr. 2581–2582) that he and Hensel scheduled it for that morning.

Charlton conceded (Tr. 1557–1564) that he was aware of a policy against charging furnaces alone because of the danger of an explosion. As furnace operator Gary Bischoff testified (Tr. 445), ''you're taking your life in your own hands.'' Hensel testified (Tr. 1936) that he has ''standing orders that nobody should charge a furnace by themselves.'' Regarding the photograph in evidence (R. Exh. 38B) of a fiery furnace blast, Hensel testified (Tr. 1961–1962, 1967):

> Any time you put any kind of solid metal into the furnace that is like 2800 degrees, if that has any moisture to it whatsoever, or any rust, it will pop a lot and flash.
>
> . . . .
>
> I mean, you could get one piece of wet pig [iron] in there, and it could blow right up at you. Something could always happen.

There is no persuasive explanation for Charlton's having deliberately violated the Company's prohibition against charging a furnace alone. Charlton was ignoring both the offer of one maintenance employee (Steve Porter) to assist and the availability of two other maintenance employees who were awaiting completion of the charges for them to perform assigned work in the melt shop.

Charlton was clearly giving a fabricated explanation when he testified (Tr. 1642):

> Q. But you elected to go ahead and do those [next two charges alone] anyway?
>
> A. Yes. If I'd—If [I] would have contacted somebody to come back here to help me out, somebody would have wondered where Rick was and, like I had said earlier, *I didn't want to get Rick in trouble*.
>
> Q. . . . You could have contacted his brother [Steve Porter].
>
> A. *Yes, I could have*. [Emphasis added.]

b. *The discharge*

The next week, on Wednesday, March 17 at the beginning of the first shift, furnace operator Gary Bischoff was present when Supervisor Hansel and General Superintendent Potts were talking to Rickie Porter in the office. Bischoff asked Charlton what was going on. Charlton said that they had Rickie Porter in there, talking to him about leaving work early the previous Saturday morning. (Tr. 462–463.)

Bischoff, who impressed me most favorably as a sincere, truthful witness, credibly testified as follows (Tr. 463–464, 482):

> A. . . . I [then] said, ''Well, did he [Rickie Porter] tell you he was leaving? Why did he have to leave?''
>
> And Brad [Charlton] said, ''Well, he told me *early in the shift that he had to leave because of personal problems at home* after [his] eight-hour shift, after he worked his eight hours.'' And Brad told me that *he did not take him serious* because it had never happened before, he had never had to leave like that.
>
> Q. Now, did you see Brad that night?
>
> A. When I was leaving that evening, Brad was coming in early for his shift, and . . . . I notified him . . . ''Well, they terminated Rickie.''
>
> And he said, ''Well, *I didn't really want him fired*. I was upset over being left alone but I didn't want him to be fired.'' [Emphasis added.]

Meanwhile, Hensel had notified the first-shift employees that the Company had terminated Rickie Porter. As Bischoff further credibly testified, ''He didn't really explain the situation. And I said, 'Well, Brad [Charlton] told me that Rickie had told him he had to leave.' And Bill Hensel just kind of said, 'Well' and walked off.'' (Tr. 464.)

Rickie Porter credibly testified (Tr. 247) that when Hensel

> called me into his office he asked me why I left early on that Saturday. And I had told him why I'd left, because I was having personal problems at home. And he just like shook his head like . . . I was lying or something. And then he told me that he heard from some of the guys the reason I left was because [of] the overtime. And I told him no, that was not true.

Rickie Porter then accused Hensel of favoritism in assigning overtime and Hensel denied it. Rickie Porter believed that Hensel was reducing his overtime because of his union support. After the discussion of overtime, Hensel said Potts wanted to see Rickie Porter in his office. (Tr. 246–248, 309–310). As found, Potts is the official who told General Foreman Dan Johnson to get rid of Rickie Porter and other union supporters if possible and told Security Site Manager Sprouse ''to keep an eye'' on certain employees, including Rickie Porter.

Upon entering Potts' office, Hensel reported that Rickie Porter had accused him of playing favoritism. After some discussion, Potts told Porter ''he was terminating me for walking off the job.'' Porter raised the issue of the Union, and Hensel said that nobody there was talking about the Union. (Tr. 248–249.)

I discredit Potts' denial that he had any knowledge of Porter's protected union activity and discredit Potts' version of

what was said in his office (Tr. 2153–2161, 2194). On cross-examination he claimed that he did not know at that point whether Porter ''had told Brad Charlton that he was going to be leaving at the end of the shift'' (Tr. 2198), but claimed the opposite on redirect examination: ''I knew that he didn't tell him'' (Tr. 2228). He appeared to be willing to give any testimony that might help the Company's cause.

The March 17 corrective action form that Hensel and Potts signed for Rickie Porter's termination (G.C. Exh. 52) reads:

> REASON FOR TERMINATION: Leaving job prior to its completion thus leaving his fellow employee in an unsafe position.
>
> . . . .
>
> REMARKS: Employee was left in a dangerous position to charge the 50-ton furnaces alone.

In sharp contrast to the Company's discharging Rickie Porter (a known union organizer), even though there were other employees available to assist Charlton in making any additional required charges, Hensel admits at the trial (Tr. 1943–1944) that he did not discipline Charlton (who had withdrawn his union card)—despite Hensel's ''standing orders that nobody should charge a furnace by themselves.''

Charlton testified (Tr. 1643) that Hensel merely told him ''never to do it again.''

c. *Shifting positions*

As late as August 9, the Company was admitting that Rickie Porter had notified Group Leader Charlton that Saturday morning, March 13, that he was leaving. As International Representative Angelo Vasi and Rickie Porter credibly testified (Tr. 212–213, 221, 249–251), Supervisor Hensel testified in a telephone hearing on that date (before an unemployment compensation hearing officer) that Rickie Porter had notified Charlton that he was leaving, but that Charlton ''believed that Rickie Porter was kidding him.''

This testimony is corroborated by the decision of the hearing officer who affirmed an earlier decision that Rickie Porter was discharged without just cause. He found (G.C. Exh. 17 p. 2) that Baum, Potts, and Hensel were witnesses in the hearing and that

> The Company offered testimony . . . that Mr. Charlton admitted that claimant [Rickie Porter] had told him he was leaving but contends that the group leader thought claimant was ''kidding.''

By the time of trial the Company not only shifted its position regarding Rickie Porter's notifying Charlton that he was leaving, but also its position regarding why it discharged him.

Although Hensel had admitted in the unemployment compensation hearing that Rickie Porter had told Charlton that he was leaving (but that Charlton thought he was ''kidding''), at the trial when called as a defense witness, Hensel denied doing so. He claimed on direct examination (Tr. 1831–1832):

> Q. And did you provide any testimony regarding whether or not Rickie Porter had told Brad Charlton that he was leaving?
>
> A. Uh, if I did testify about it, I told them that he did not tell Brad Charlton.
>
> Q. Okay. And do you recall whether or not you testified to that fact?
>
> A. I can't remember.
>
> Q. And do you recall whether or not you testified that Rickie Porter did tell Brad Charlton?
>
> . . . .
>
> THE WITNESS: All I knew was that Rickie, according to Brad, did not tell him that he was going to be leaving that night.

I discredit this testimony as fabrications. Hensel did not impress me as being a trustworthy witness.

Earlier at the trial on June 14, 1994, when Charlton was called as a defense witness, he testified that Rickie Porter was upset about Hensel's assignment of overtime. He claimed on direct examination for the first time—not mentioned in his 9-page pretrial affidavit given over a year earlier on May 12, 1993 (Tr. 1644; G.C. Exh. 50)—that about 11 o'clock at the *beginning* of the third shift that Friday night, March 12 (Tr. 1574–1575): ''[Rickie Porter] said that he ought to go home after he put his eight hours in. F__ck Bill [referring to Hensel].''

Further on direct examination, Charlton claimed (Tr. 1599–1600):

> Q. At any time during that shift, other than the comment that he made at the beginning of the shift, at any time did he tell you he was leaving at 7:18?
>
> A. No.
>
> Q. Did he tell you any reason that he might be leaving early?
>
> A. No.
>
> Q. If you had been aware that Mr. Rickie Porter was leaving at 7:18, what would you have done?
>
> A. There's a list of phone numbers for all the employees on the board. I could have called one of them to come in and finish up my shift or, if I couldn't get hold of anybody, I would have called Bill Hensel and he would have taken care of it.

I discredit this testimony as further fabrications. Charlton ignores the fact that there was no reason for him, as the group leader in charge, to call in another employee. Rickie Porter's brother Steve and two other maintenance employees were working that Saturday morning and were assigned to work in the melt shop when the charging of the furnaces was completed.

I note that at one point on direct examination, Charlton conceded that he ''could have'' told Hensel that Rickie Porter ''said he had an emergency,'' but immediately changed his testimony when asked a leading question by company counsel (Tr. 1602):

> Q. [By Stephen Sferra] Did you tell [Hensel that Wednesday morning, March 17] whether Rickie said he had an emergency?
>
> A. *I could have* [emphasis added], but I don't know what Rick would tell him.
>
> Q. Rickie didn't tell you he had an emergency, did he?
>
> A. No.

The March 17 corrective action form, signed by Hensel and Potts, assigned only two reasons for discharging Rickie Porter, who previously had a perfect 6-year attendance record with no warnings of any rule violation. The stated reasons were first, leaving the job prior to its completion and second, leaving his fellow employee in a dangerous position to charge the 50-ton furnaces alone.

At the trial the Company shifted its position and contended that there were three additional reasons.

As the first purported additional reason, Hensel claimed (contrary to his testimony in the unemployment compensation hearing) that Rickie Porter did not tell Charlton or anybody he was leaving (Tr. 1822, 1932). Hensel admitted that Rickie Porter said in his March 17 meeting with Hensel and later in his meeting with Hensel and Potts that he told Charlton that he had family problems or problems with his boy, but claimed that Rickie Porter did so at the end of the conversations (Tr. 1929–1930).

Second, Hensel claimed that the Company discharged Rickie Porter also for being ''insubordinate.'' Hensel claimed that in his office when they were discussing Porter's leaving Charlton alone, Porter told him, ''Well, if I wanted to, I could really f__k you'' (Tr. 1819) or ''Bill, if I really wanted to screw you, I could f__k you real bad'' (Tr. 1926). Upon being reminded on cross-examination that Rickie Porter's corrective action form ''states nothing about insubordination,'' Hensel's only response (Tr. 1934) was: ''This [the two stated reasons] was enough to discharge him.''

I note that the copy in evidence of a handwritten memo (R. Exh. 44, dated 7 a.m., March 17), which Hensel testified he prepared ''Immediately after our meeting'' (Tr. 1826), shows clearly on its face that the last paragraph on page 2 and the paragraph on page 3 were added with a different pen (with lighter ink). I infer that it was added near the time of trial to support the Company's shifting positions. The last paragraph on page 2 reads:

> Also, it is worth noting that during our conversation I told Rickie that in leaving his job the way he did he really screwed me up. His reply was, ''If I wanted to I could really f—k you!''

Third, Hensel claimed that a further reason for discharging Rickie Porter was that he was ''spiteful to me,'' ''openly defiant,'' and ''really cocky acting'' (Tr. 1822, 1927). I find that this is a further fabrication, not stated on the corrective action form.

Concerning the stated reason that Rickie Porter left Charlton ''in a dangerous position to charge the 50-ton furnaces alone,'' Hensel reluctantly admitted on cross-examination that before discharging Porter, he did he did not investigate whether other employees were present at the time, did not ask Charlton, and did not investigate whether Charlton was really put in an unsafe position (Tr. 1938–1943).

d. *Concluding findings*

The March 17 corrective action form does not state, as a reason for terminating Rickie Porter, that he left work without notifying Group Leader Charlton. It states only that Porter left the job ''prior to its completion,'' leaving (Charlton) ''in a dangerous position.''

Nearly 5 months later, as found, Melting Supervisor Hensel admitted in an unemployment compensation hearing that Rickie Porter had told Charlton that he was leaving, but that Charlton ''believed that Rickie Porter was kidding him.''

The Company was obviously attempting to bolster its defense for discharging this union organizer by presenting false denials at the trial that Porter had notified the group leader that he was leaving and by presenting fabricated testimony that Porter had been ''insubordinate'' and ''openly defiant.''

Moreover, the Company knew at the time it discharged Rickie Porter that he had not left Charlton ''in a dangerous position'' that Saturday morning, March 13. Supervisor Hensel knew that maintenance employees were available to assist Charlton in making any additional required charges after Porter left, because General Foreman Ellison and he had scheduled maintenance employees to install the inductor on No. 3 furnace when the charges were completed that morning.

Particularly in view of the Company's shifting positions and General Foreman Dan Johnson's credited, undenied testimony that the Company had been seeking a pretext for getting rid of Rickie Porter because of his union organizing, I find that the General Counsel has made a strong prima facie showing that Rickie Porter's organizing activity was a motivating factor in the Company's decision to discharge him. *Wright Line*, 251 NLRB 1083 (1980). I further find that the Company has failed to meet its burden of proof that it would have discharged him in the absence of his union activity.

Accordingly I find that the Company violated Section 8(a)(3) and (1) by discharging Rickie Porter on March 17, 1993, and by refusing to reinstate him.

6. Discrimination and discharge of William Nieves

a. *Key target*

The evidence clearly shows that William Nieves, admittedly the senior and most qualified electrician who was doing ''excellent'' work, was a key target in the Company's efforts to rid the plant of union organizers.

As found, President Foster, who actively participated in the Company's antiunion campaign, named Nieves as one of the ''earliest people'' (along with Steve Porter and Robert Bunting) that he knew were involved in the Union.

The Company demonstrated its belief that Nieves was the leading union organizer when Vice President Baum named him in the forged ''Your Leaders'' union notice as ''President'' of the Union. General Superintendent Potts instructed General Foreman Dan Johnson specifically to ''keep and eye on'' him for his union organizing and ''if there's anything possible,'' to ''get rid'' of him. Potts also instructed Security Site Manager Sprouse ''to keep an eye'' on Nieves, along with other listed ''Leaders.''

Also, as found, 1 day after the local newspaper published the photograph of Nieves, Steve Porter, and Bunting under a banner headline, ''UNION THREAT PLAGUES FOUNDRY,'' the Company unlawfully gave him a final warning of termination on March 24 for violating its no-solicitation rule. Despite the Company's unlawful surveillance of union supporters, it admits that no foreman had reported Nieves' violating the rule. The Company had been secretly collecting written complaints from antiunion employees against union supporters, but the only one naming Nieves concerns his so-

liciting for the Union on February 9 (6 weeks earlier) ''outside the lunchroom''—without alleging that this occurred during working time.

b. *Nieves' suspension*

(1) Rob Johnson's promotion

''President'' Nieves was the first union supporter to be disciplined—purportedly for being insubordinate and disrespectful to a newly promoted maintenance supervisor, Rob Johnson.

This occurred shortly after Potts told General Foreman Dan Johnson that the union organizing started in the maintenance department and instructed Dan Johnson to engage in surveillance and ''if anybody was giving'' him any problems, to ''suspend them and let the front office deal with it.'' There is no direct evidence that Potts gave similar instructions to Rob Johnson, but his conduct in suspending Nieves and sending him to the front office demonstrates that he was acting under the same instructions.

The evidence does indicate that in early February, President Foster had employee Rob Johnson promoted in the maintenance department from ''buyer-expediter'' to ''maintenance supervisor-buyer,'' with instructions to report not only to Maintenance General Foreman Ellison, but also to Potts (Tr. 2230).

Even though Ellison admitted at the trial (Tr. 2643) that all of his maintenance employees ''were doing their job,'' Foster included the following paragraph in his confidential memo to Ellison on February 1 (R. Exh. 60):

> We have also been advised by members of your department that some of your people are not pulling their own weight. Therefore, please modify Rob Johnson's role to include daily supervision of your people so that we can maximize their effectiveness during the normal workweek.

Ellison testified (Tr. 2642) that he never asked Foster who reported it or who was ''not pulling their own weight'' and that what Foster wanted was for him to ''check and see if there was a problem there.'' Rob Johnson admits that he has no qualification as an electrician or millwright, or to perform the work of the maintenance department (Tr. 2231). Although promoted to supervisor, he was still an ''expediter'' or ''buyer/expediter'' (Tr. 713–715, 2250, 2271).

He immediately began carrying out what were apparently his surveillance duties. Nieves' credited testimony (Tr. 573) is undisputed that Rob Johnson, like Dan Johnson, would ''step right in between you when you were talking to someone just to hear what you were saying. . . . A few of us would be talking about anything, about a job, washing our hands, ready to go home, whatever, and he would come and he would stand right there. . . . between us. . . . Trying to hear what was being said.''

(2) The suspension

The opportunity for Rob Johnson to suspend Nieves and send him to the office occurred on February 11 when their department supervisor, Ellison, sent Nieves and two other employees to work on the 5-ton crane in the melt shop. About 9 o'clock that morning they needed some cable clamps on the job. Nieves first tried to call ''expediter'' Rob Johnson, but Johnson did not answer the radio. Nieves then called Ellison and asked him ''to have Rob Johnson fetch us some cable clamps.'' Johnson overheard the radio conversation. (Tr. 576–578, 715–716, 2233.)

Ellison took no offense at Nieves' using the word ''fetch,'' which was commonly used in the maintenance department (Tr. 579, 846).

At quitting time that day, sometime after 2 p.m., Nieves walked into the maintenance area, saw a group of people gathered, and said, ''No loitering,'' that it was against company rules. As elicited on cross-examination of Nieves, Ellison had informed the maintenance employees in a meeting that ''you people are being watched, so watch what you do, we want no loitering, no gathering, you people are being watched by supervisors.'' (Tr. 578, 716–717.) Rob Johnson testified (Tr. 2272) that he thought the ''no loitering'' remark was a sarcastic remark, but that ''No, not really,'' did he ''take offense to that.''

As Nieves was washing up, Rob Johnson called him aside. As Nieves recalled the conversation (Tr. 579–580):

> [Rob Johnson] told me that he didn't like . . . what I had called him today and I asked Mr. Johnson what are talking about and he says I don't like you insinuating that I'm a dog and I says I have never insinuated you're a dog. He said . . . you wanted me to fetch these cable clamps and I told him, Rob, this is just a figure of speech. . . . we use it all the time working together. Fetch me that wrench or would you fetch me this, whatever. . . . it is not meant as an insult to you in any way and Mr. Johnson said, well I don't want you . . . to say that word to me again to have me fetch anything else again and I says, okay, Rob, but it wasn't meant as an insult, I did not mean to call you a dog. He then said you're suspended and . . . . walked out of the maintenance shop and I believe he went to the front office to talk with Mr. Potts. . . . He came back a few minutes later and told me [to come in at 9 instead of 6 a.m. the next morning] and go directly to a meeting in the front office with Mr. Potts.

Rob Johnson would not admit on cross-examination why he reported directly to Potts about suspending Nieves (Tr. 2270):

> Q. So, it was immediately . . . after your conversation with Mr. Nieves, then you called Mr. Potts?
>
> A. Yes.
>
> Q. Why didn't you talk to Mr. Ellison?
>
> A. Because—I don't know why I didn't do that. Jim was busy on the job. I don't know why I didn't do that.

Earlier, when testifying as a defense witness and asked to repeat his entire conversation with Nieves, Rob Johnson testified (Tr. 2234–2236) that around 2 p.m. in the maintenance shop he asked Nieves to step over to the side and

> I asked Bill if there was a problem between us. I didn't think there was in the past. I asked him if he could please ask me in a different way rather than to ''go fetch something.'' And he said that he'd ask me . . . any way he wanted to. And I asked him again. . . .

> ''Please don't ask me that way.'' And he said, ''If I want you to go fetch something, I'll tell you to go fetch something.''

Rob Johnson further testified (Tr. 2236) that the conversation lasted 2 or 3 minutes and that he told Bill he was suspended and then telephoned Potts.

Nieves testified on cross-examination (Tr. 718):

> Q. And isn't it true that during that conversation with Mr. Johnson you said to him, ''if I want to ask you to go fetch something, I'm going to ask you to go fetch something''?
>
> A. No, sir, that is not true.
>
> Q. Isn't it true that you also said to Mr. Johnson, ''if I want you to go get something, I will say it any way I want to''?
>
> A. No, sir, that's not true.

Rob Johnson testified (Tr. 2245–2246) that before the 9 a.m. meeting on February 12, he had already filled out the top of the February 11 corrective action form (R. Exh. 57). He was evidently referring to the handwriting, including Reason for Action, ''Insubordination, Repeated display of disrespect for a Supervisor,'' effective February 11, and Action Taken (1) ''Suspension w/pay until 2/12/93 9 a.m. meeting /w Bill, Rob and Jim Potts.''

Rob Johnson later admitted that Nieves said he didn't mean it as ''go fetch something'' like a dog (Tr. 2249). Johnson then testified on cross-examination (Tr. 2278):

> Q. Well, did you . . . believe, after your conversation with Mr. Nieves, that he meant ''fetch'' to be in a derogatory manner?
>
> A. Yes.
>
> Q. So, you continued to believe, even after his explanation, that he was being insubordinate to you by using the word ''fetch''?
>
> A. Yes. He was coy when he was explaining to me that he didn't mean it to be derogatory.

In the February 12 meeting in Potts' office, Vice President Baum was present part of the time, but Ellison was not present. After the meeting, Nieves stepped outside as Baum, Potts, and Rob Johnson conferred. They then suspended him without pay for the remaining 5 hours of the workday. (Tr. 580–581.)

Potts wrote on the corrective action form as Action Taken (2) ''Meeting 2/12, Suspension from start of meeting 9 a.m. No pay for rest of the workday. Back to work Sat Feb 13 regular time.'' Potts handed Nieves the form to signed. He refused but did initial it. (R. Exh. 57; Tr. 581, 2245–2246.)

This was the first disciplinary action that Nieves ever received. It was the Company's first corrective action form given anybody in the maintenance department in 1992 and 1993, except for attendance (Tr. 581–582, 2643–2644).

(3) Potts' notes of meeting

General Superintendent Potts' notes taken during the February 12 meeting in his office tend to corroborate Nieves' version of the ''fetch'' conversation the afternoon before.

Potts' notes, in typed form, are the second and third pages attached to the February 11 corrective action form (R. Exh. 57). Page 2 reads, in part:

> Bill [Nieves] requested a man from hourly. He said he will go in under protest if he doesn't have anybody. We went into my office and started the meeting out by asking Bill to tell us in his own words what his side of the story was. . . .
>
> Bill started out by saying ''I was up on a job in the melt shop on a 5 ton crane. I needed some parts. Rob [Johnson] is the expediter so I tried to call Rob on the radio. Couldn't get Rob so I called Jim Ellison to have Rob fetch me six cable clamps.''
>
> [S]ometime after 2 p.m. [in] the maintenance shop. . . . Rob came out and asked if he could talk to me. Rob asked me what was wrong that we usually get along well. Nothing was wrong, Bill said.
>
> Then he in reference to conversation that was said on the radio. . . . Rob said I used the word ''fetch'' when I asked for the cable clamps and he said he was not a dog and he did not fetch things. My reply was the word fetch was strictly a figure of speech and we use this in the maintenance department all the time and I was not trying to call him a dog. Rob said ''you are being insubordinate. You are suspended. . . .'' Rob left the maintenance area. I believe to check with Jim Potts. When he came back to the maintenance area, he walked into the office when I was putting my radio back in the charger and informed me that I was suspended with pay . . . till 9 a.m. 2/12/93 (the next day) at which time I would have a meeting with Jim Potts in his office.

Potts' notes state on page 3 what Rob Johnson responded in the meeting:

> Rob made it clear [to Nieves] that the word ''fetch'' is not to be used. If I [Rob Johnson] am offended I would let someone know no matter what the term may be.

According to Potts' notes, this was Rob Johnson's only response to Nieves' version of what happened the day before. There is no reference in Potts' notes to corroborate Johnson's claim that Nieves said he would ask Johnson ''any way he wanted to,'' or ''If I want you to go fetch something, I'll tell you to go fetch something.''

I find that this statement that Rob Johnson made to Nieves in the disciplinary meeting in Potts' office belies an answer that Johnson gave on direct examination (Tr. 2247–2248):

> Q. [By Stephen Sferra] So, for what comments did you decide to suspend Mr. Nieves?
>
> A. The comments that he would talk to me any way that he wanted to.

(4) Rob Johnson's conflicting testimony

Rob Johnson gave much conflicting testimony about the three typed pages attached to the corrective action form (R. Exh. 57). Page 1 is a memo to the file dated February 11, 1993, Subject: ''Rob Johnson Statement Re: Bill Nieves.''

As indicated, pages 2 and 3 are Potts' notes taken during the February 12 meeting.

Johnson positively testified (Tr. 2239) on direct examination that he did not prepare any written memo before the February 12 meeting. When the company counsel asked if he prepared a ''written memo'' after that meeting, Rob Johnson testified that he took ''notes'' during the meeting, ''or Jim Potts did,'' and that President Foster's secretary, Carol Metlock, typed the ''notes.'' He further testified:

> Q. [By Stephen Sferra] And did you present the *notes* to Carol?
>
> A. Yes.
>
> Q. Did you ever review the typed *memo* that Carol prepared?
>
> A. No, I did not. I didn't receive one back. [Emphasis added.]

No notes taken by Johnson during the meeting were produced at the trial. Johnson's typed memo to the file, dated February 11 and attached to the corrective action form, is evidently what the counsel was referring to.

The company counsel then called to Rob Johnson's attention the words ''See attached'' on the corrective action form (R. Exh. 57) on the line below the words ''Insubordination, Repeated display of disrespect for a Supervisor'' and asked (Tr. 2240):

> Q. . . . Would you look at that three-page attachment and tell me whether those are the typed version of *your notes* [emphasis added] or not?
>
> A. Yes, they are.

There is no evidence when the words ''See attached'' were added to the February 11 corrective action form or when Johnson's memo to the file and Potts' notes were actually attached.

Upon being asked, ''When is the first time you every saw the attachment,'' Johnson this time admitted (Tr. 2240), ''I reviewed them shortly after they were typed,'' but added ''that would have been the last time I saw them.''

Because of the contents of Johnson's memo to the file, misdated February 11, I consider it most unlikely that he would have been placed on the stand without having reviewed the memo. This memo states that Nieves told Rob Johnson in their 2 p.m. discussion on February 11 ''if I want to ask you to go fetch something I am going to ask you to go 'fetch' something,'' and ''if I want you to go get something, I will say it any way I want to.'' At the trial, Johnson repeated various versions of this. (Tr. 2235–2236, 2243–2244, 2249–2250, 2268–2269, 2277–2278.)

Finally on voir dire examination (Tr. 2254–2255), Rob Johnson testified that page 1 of the attachment is his and claimed ''I believe'' that page 2 (actually the first page of Potts' notes) is also his, but not page 3 (the page on which Potts stated that Johnson ''made it clear'' to Nieves in the February 12 meeting that the word ''fetch'' is not to be used, or any other term that offends Johnson). Although the Company did not offer page 3 for the truth of the document (Tr. 2255–2256), I consider it an admission against interest.

I infer that one reason for Rob Johnson's conflicting testimony is that page 1 of the attachment to the February 11 corrective action form is not Rob Johnson's notes of the disciplinary meeting, but a memo to the file that was prepared later and attached to the corrective action form as part of the Company's defense.

I discredit, as a fabrication, Rob Johnson's claim in his memo to the file, and his supporting testimony at the trial, that Nieves told Rob Johnson in their 2 p.m. discussion that ''if I want to ask you to go fetch something I am going to ask you to go 'fetch' something,'' and ''if I want you to go get something, I will say it any way I want to.'' I also discredit Johnson's above-quoted answer to the company counsel's question, that the comments for which he decided to suspend Nieves were ''[t]he comments that he would talk to me any way that he wanted to.'' Rob Johnson did not impress me on the stand as being a credible witness.

I credit Nieves' version of what transpired in his conversation with Rob Johnson about Nieves' use of the word ''fetch.''

(5) Contentions and concluding findings

The General Counsel contends in his brief (at 17) that a fair judgment of what happened is that Nieves' suspension was nothing more than an extension of what General Superintendent Potts had told General Foreman Dan Johnson to do, ''write them up, including Nieves, and get rid of them.'' Clearly at that time Nieves was considered to be the primary employee behind the Union. His suspension constitutes a violation of Section 8(a)(3) and (1).

The Company contends in its brief (at 108, 113):

> Notwithstanding that the union leader was disciplined at the height of the organizing drive, he was suspended for his clear insubordination toward newly appointed supervisor Robert Johnson and not for his protected activities.
>
> . . . .
>
> Nieves' derogation of Johnson's authority was . . . egregious and fully warranted his suspension.
>
> Despite Nieves' leadership position with the Union, the General Counsel's claim of an antiunion motive rings hollow.

Relying on discredited testimony, the Company emphasizes in its brief (at 108, 110) that ''*Johnson made no decision to suspend Nieves based on the 'fetch' comment*'':

> It is important to distinguish that Nieves was *not* suspended for his initial, and perhaps innocuous, ''fetch'' comment. Rather, the discipline stemmed directly from his two blatantly insubordinate remarks to Johnson during their afternoon discussion: ''If I want you to fetch something, I'll tell you to go fetch it'' and ''I'll ask any way I want to.''

In making this contention the Company ignores Johnson's admission that even after Nieves explained that he did not mean it to be derogatory, Johnson continued to believe that Nieves was being insubordinate by using the word ''fetch.'' It also ignores the fact that Johnson ''made it clear'' to Nieves in the February 12 disciplinary meeting (as recorded in Potts' notes of the meeting) that the word ''fetch'' is not to be used, or any other term that offends Johnson.

Having weighed all the facts and circumstances, I find that Rob Johnson was following Potts' instructions to seek a pretext for discriminating against Nieves to further build a case against him for his eventual discharge. I therefore I find the General Counsel has made a prima facie showing that Nieves' activity as the leading union organizer was a motivating factor in the Company's decision to suspend him. I find that the claimed insubordination is a pretext for the suspension and that the Company has therefore failed to meet its burden of proof that it would have suspended him in the absence of his union activity.

Accordingly I find that by discriminatorily suspending Nieves on February 12, 1993, the Company violated Section 8(a)(3) and (1).

c. *Reduced overtime*

(1) Sunday overtime

Before Maintenance General Foreman Ellison announced a reduction of maintenance department overtime in early February, Nieves was often working 7 days a week. As examples, during the weeks ending January 10, 17, and 24 and February 7, he worked all four Sundays and averaged 20.6 hours a week overtime. (R. Exh. 74; Tr. 575–576, 2450–2451.)

Nieves testified that between that time and July 8, the week before he was discharged, he was never asked again to work any Sunday overtime. Steve Porter (another principal union organizer, along with Robert Bunting) also testified that he was not asked to work any Sunday overtime. (Tr. 917, 2716, 2695.)

In contrast Ellison, when called as a defense witness on the last day of trial, claimed (Tr. 2445):

> Q. [By Stephen Sferra] After this memo [from President Foster dated February 1], did you ever cease asking Mr. Bill Nieves if he would work Sunday overtime?
> A. No.
> Q. How often—
> A. Never ceased.
> Q. How often did you ask him?
> A. Asked every week.
> Q. Who did you ask every week?
> A. I asked Bill Nieves *every week* and everybody else in my department.
> Q. Would that include Steve Porter?
> A. Yes. [Emphasis added.]

The Company's timecards (R. Exh. 74; G.C. Exh. 40) belie these Ellison claims, as well as his further similar claims on direct examination (Tr. 2463–2467).

The timecards show that there was *no* Sunday overtime in the maintenance department in the 5-month period from the week ending February 14 until the week ending July 11, except on the third (11 p.m. to 7:18 a.m.) shift on three occasions, during the weeks ending April 18 and 25 and May 16. There was *no* Sunday overtime on the first shift (on which Nieves and Steve Porter worked) or on the second shift in that entire period of time.

Thus, Nieves and Steve Porter truthfully testified that they were not asked to work Sunday overtime. In the absence, however, of Sunday overtime being worked (except occasionally on the third shift), they were mistaken in their belief that they were being discriminated against in the assignment of Sunday overtime. On the other hand, the record shows that Ellison was willing to give false testimony in the Company's defense, claiming that he asked both of them and ''everybody else'' in his department ''every week'' to work Sunday overtime.

On facts discussed above, I find that the General Counsel has made a prima facie showing that the employees' union organizing was a motivating factor in the Company's announced reduction in Sunday overtime. I find, however, that the Company has met its burden of proof that it would have reduced the Sunday overtime even in the absence of its antiunion campaign. Foster's ''confidential'' February 1 memo to Ellison (R. Exh. 60), instructing him to move to ''[e]liminate all Sunday overtime immediately except in the case of dire emergency,'' specifically states that ''[t]his is primarily a safety and health issue'' and that Foster made the decision ''in view of the safety and health aspect of this issue.''

I also find that the General Counsel has failed to make a prima facie showing that before May 10 (when the Company began depriving Nieves and Steve Porter of overtime pay for Saturday work), the Company had distributed overtime on a discriminatory basis. Therefore, for the period before May 10, 1995, I reject the allegation in the complaint that the Company discriminated in the distribution of overtime.

(2) Shift change

(a) *Reassignment of employees*

Before May 10, senior employees Nieves and Steve Porter were working Monday through Friday and were always paid at the overtime rate for Saturday work. On May 10 the Company ignored their seniority and placed them on a new Tuesday-Saturday shift, requiring them to work on Saturdays at straight time. (Tr. 587, 2646–2647.)

When Ellison called Nieves in and reassigned him to work Tuesday through Saturday, Nieves did not ask any questions about why. As he credibly explained (alluding to his union activity), ''I didn't have to'' (Tr. 587). Steve Porter, however, protested when called in. He told Ellison, ''I have always had overtime for Saturday,'' pointed out his ''being one of the senior millwrights there,'' and asked ''why haven't I got Monday through Friday?'' It is undisputed that Ellison answered, ''Because I chose to put you on Tuesday through Saturday.'' (Tr. 859.)

This shift change, being made after the Company eliminated Sunday overtime (except occasionally on the third shift), deprived both Nieves and Steve Porter of all overtime, unless they worked all 5 days in a holiday week. Meanwhile, Supervisor Ellison continued to assign Monday–Friday shift employees to work at the overtime rate on Saturdays, working alongside Nieves and Porter who were being paid straight time. (G.C. Exh. 40; R. Exh. 74.)

As an example electrician Juan Cintron, who had signed an antiunion petition on January 27 (R. Exh. 26 p. 5), worked at the overtime rate on Saturdays six of the seven times in weeks ending May 16 through June 27. Yet, despite the shortage of technicians on Mondays, Supervisor Ellison refused to permit Nieves and Steve Porter, two principal union organizers, to work overtime on Mondays. Ellison ad-

mits ''we ran into some problems not having enough manning on that first day of the week. . . . We needed more help there.'' (Tr. 918, 2459, 2724–2726; G.C. Exh. 40; R. Exh. 74.) I discredit Ellison's claim on redirect examination (Tr. 2658–2659) that he offered both Nieves and Porter Monday overtime work a ''couple of times'' and they did not accept.

At the time of the May 10 shift change, there were 16 Grade 17 maintenance repair technicians (electricians and millwrights) in the maintenance department, working on three shifts (G.C. Exh. 40; R. Exh. 74; Tr. 674).

Before the May 10 shift change, 10 of the 16 technicians worked Monday through Friday on the day (1st) shift. They were Gregory Bittner, James Brunson, Thomas Burton, Juan Cintron, Kenneth Lehman, William Nieves, Steven Porter, Leonard Rubinski, Jan Sobolewski, and William Stentz. The four technicians on the afternoon (2d) shift were James Bassett, Henry Dutton, Melvin Howard, and John Osbun. The remaining two technicians worked on the early Saturday morning (3d) shift from 11 p.m. Monday night to 7:18 a.m. Saturday morning. They were Thomas Partlow and Russell Simmons. (G.C. Exh. 40.)

On May 10 the Company reassigned 4 of the 10 technicians on the Monday day crew of the Monday–Friday shift (Lehman, Nieves, Steve Porter, and Sobolewski) to the Saturday day crew of the Tuesday–Saturday shift, none of the 4 technicians on the Monday afternoon crew, and 1 of the 10 technicians (Stentz) to the early Saturday morning crew (with Partlow and Simmons), who were already working early Tuesday morning through early Saturday morning.

Thus, having reassigned 5 of the 16 technicians from the Monday–Friday to the Tuesday–Saturday shift, the Company had 9 technicians available to work on the Monday day and afternoon crews and 4 technicians (Nieves, Steve Porter, and two others) available to work those hours at straight time on Saturday.

The other eight employees in the department were not Grade 17 maintenance repair technicians. They were employees in Grades 4 through 9. The Company retained one of them (Leonard Smith) on the Monday day crew and two of them (Jesse Deel and John Parks) on the Monday afternoon crew. It reassigned four of them (Timothy Bivins, Joseph Grisez, Robert Hall, and Fred Voros) to the Saturday day crew and one (Timothy Ruh) to the early Saturday morning crew. (G.C. Exh. 40.)

Thus, after the shift change, the Company had a total of 12 department employees (9 technicians and 3 others) available to work on the Monday day and afternoon crews and 8 department employees (4 technicians and 4 others) available to work those hours on Saturdays.

(b) *Purported reasons*

According to Ellison (Tr. 2455–2456), he wanted to cover six production days with crews working only five days a week, to pay straight time for Saturday work, and ''to try to get back closer to a 40-hour schedule.''

Ellison's only explanation for reassigning Nieves and Steve Porter to work on Saturdays at straight time was ''I have to have a strong crew'' and the quality of their work was ''excellent'' (Tr. 2458). I discredit this explanation as a fabrication. With only four technicians and four others working, there could not be a ''strong crew'' during the day on Saturdays.

(c) Further reassignments

Technician Simmons quit on June 2 and the Company replaced him on the early Saturday morning crew with technician Sobolewski from the Saturday day crew. This left only three technicians (Lehman, Nieves, and Steve Porter) working on the Saturday day crew at straight time.

On June 21 the Company reassigned technician Lehman, who had signed an antiunion petition (R. Exh. 26 p. 4), back to the Monday–Friday day shift. The Company continued assigning him Saturday work, but at the overtime rate. The only technicians then remaining on the Saturday day crew and still being paid straight time for Saturday work were union organizers Nieves and Steve Porter.

The timecards (G.C. Exh. 40; R. Exh. 74) show that, except payment for a half hour when he worked through lunch on June 30, Steve Porter received no overtime in the entire period from May 10 until the week ending August 8 (over 3 weeks after Nieves was discharged on July 13). Meanwhile, Cintron and other employees resumed Sunday work during the week ending July 18, Cintron began working 7 days a week the following week, and other employees joined Cintron in working a 7-day week during the week ending August 1.

When Steve Porter was finally returned to the Monday–Friday shift on August 2 (the week after others were already working 7 days a week), he was permitted to work overtime on Saturdays, but still not with others on Sundays (G.C. Exh. 40; R. Exh. 74).

(d) *Concluding findings*

The Company argues in its brief (at 70–71) that its splitting the maintenance employees into two crews was lawfully ''motivated by the dual considerations of achieving adequate maintenance coverage at reduced overtime costs''—not to coerce union supporters—and that ''the switch back to a regular workweek was motivated by the Company's inability to complete necessary maintenance, particularly on Mondays.''

The Company's only explanation for selecting Nieves and Steve Porter to work on the Saturday crew (at straight time instead of overtime) is based on Ellison's discredited ''strong crew'' explanation. It argues in its brief (at 71–72) that ''Ellison characterized Nieves and Steve Porter as 'excellent' workers who were assigned to the Tuesday–Saturday shift to help strengthen that crew.''

After weighing all the evidence, I find that even assuming the Company was lawfully motivated in splitting the maintenance shift on May 10, 1993, the General Counsel has made a strong prima facie showing that Nieves' and Steve Porter's union organizing was a motivating factor for the Company's reassigning them to the new Tuesday–Saturday shift to work on Saturdays at straight time and denying Steve Porter Sunday overtime work after Nieves' discharge.

I further find that the Company has failed to meet its burden to demonstrate that it would have assigned them to work Saturdays at straight time or would not have assigned Steve Porter Sunday overtime even in the absence of their protected conduct.

I therefore find that the Company discriminatorily denied William Nieves and Steve Porter assignments of Saturday

overtime beginning the week ending May 16, 1993, and denied Steve Porter assignments of Sunday overtime beginning the week ending July 18, 1993, in violation of Section 8(a)(3) and (1).

d. *Nieves' discharge*

(1) Overview

Certified journeyman electrician William Nieves (a former U. S. Steel electrician) was the senior, No. 1 electrician at the foundry. His specialties were both electricity and electronics. The Company admits that he was the most qualified electrician, doing ''excellent'' work. He had performed about 20 furnace startups. Before he began leading the union organizing campaign, he had never received any warnings or reprimands. (Tr. 560–562, 649, 674, 677, 691, 733; R. Br. at 114.)

As found, Nieves was one of the principal union organizers (along with Steve Porter and Robert Bunting) whom General Superintendent Potts had instructed General Foreman Dan Johnson to ''keep an eye on'' and ''if there's anything possible to get rid of them.''

President Foster had promoted Maintenance Supervisor-Buyer Rob Johnson to that position near the beginning of the organizing drive, at least in part to engage in surveillance of the union activity. Within a week or so after Johnson's promotion, the Company discriminatorily suspended Nieves purportedly for being insubordinate and disrespectful to him.

Rob Johnson was the supervisor who provided Nieves with the wrong electrical wire for rewiring a furnace. The wire had the correct voltage rating, but it had an inner insulation that was covered with a fine spiraling copper wire and an outer insulation that made it too large to be used inside the furnace cabinets. Johnson failed to locate the proper wire. After checking with the supplier, he authorized Nieves to use the wire after stripping the spiraling wire and outer insulation from it.

On the startup, when high voltage was being put on the furnace, the inner insulation failed, causing the wire to arc and burn and a near loss of the furnace at an estimated cost in excess of $180,000. The wire was replaced with proper wire just in time to avoid this disaster.

The Company took no action against Rob Johnson for authorizing on his own the use of wire with inadequate insulation without consulting higher management. It instead summarily discharged Nieves. Without talking to Nieves, Vice President Baum prepared three discharge documents to the file, blaming Nieves but making no reference to the faulty wire that Rob Johnson authorized Nieves to use.

On the sixth day of the trial Baum falsely testified that ''There was no question about the adequacy of the wire.''

On the last 2 days (the 9th and 10th days) of the trial, the Company shifted its position and admitted that the wire was faulty. In an apparent attempt to bolster its defense for discharging this principal union organizer, the Company then produced (but did not offer in evidence) a short piece of the wire that had spiraling grooves on the insulation, demonstrating that it was the actual wire used.

The insulation on this piece of wire had been polished and had ''Semi-conducting'' printed on it in ''very clearly visible'' white lettering. This altered wire served the purpose of enabling the Company to argue that Nieves was to blame for using the wire, but at the same time it revealed that the discharge documents—omitting any reference to faulty wire—were deceitfully prepared by Baum to justify a discriminatory discharge.

(2) Faulty wire authorized

In early April the Company assigned Nieves to do the necessary electrical repairs for putting the No. 2 induction furnace back in service in 4 to 6 weeks. Nieves determined that all of the 100 or 150 cabinet wires had to be replaced. (Tr. 592–595, 2750.)

Nieves took a sample of the wire to Supervisor-Buyer Rob Johnson, who said he would order the wire. While awaiting its arrival, Nieves performed various preventive maintenance functions. When the wire came in, Nieves told Johnson, ''This is not the correct wire.'' It was a special application wire that was too large for use inside the cabinets. It had the proper voltage rating printed on the outside coating, but underneath this insulating coating was copper wiring and inner insulation. (Tr. 596–599.)

As Nieves credibly testified, Rob Johnson said it would take about 6 more weeks ''before we can get you the wire that you asked for, nobody has that wire, and I says, well, you keep on trying different places, try different manufacturers to get the wire . . . and he says, well . . . okay'' (Tr. 599–600.) Johnson later told Nieves (Tr. 600):

> Bill, I called so many places, I couldn't get ahold of the wire that you want . . . but I called the people that sold me this wire . . . and they told me that this wire was okay for your use . . . all you got to do is strip the outside insulation, take the copper away, the copper wrapping around the wire, and just use the wire under there. . . . I had noticed that the insulation was of a different color. . . . like grayish, sort of tacky . . . and I says . . . are you sure I can use this safely. He said they assured me this is 5000-volt capacity, you can use it. I says okay. . . .

Nieves further credibly testified (Tr. 600–602, 766, 2729) that there were

> several reasons why I didn't want to use the wire. One of them was because you had to strip all this insulation. This is big wire and it's hard work . . . you got to strip [the top insulation] and you got to get rid of it and then you got to unravel [the spiral copper wire], this is all added work, added time, and then, of course, you use the wire that's underneath all this.
>
> . . . .
>
> . . . [I]f I would have refused to do anything or if I would have argued with Mr. Johnson at any time, under the circumstances involving the Union, my activities with the Union at this time, I would have been fired automatically for refusing to do a job.
>
> . . . .
>
> A. . . . [Johnson] told me to go ahead and strip the insulation and use it like that.

There was nothing printed on the inside insulation. Nieves' 25 years of experience as a trade electrician had not qualified him to make an independent determination of the adequacy

of insulation. He has relied on the voltage ratings that manufacturers print on wire. (Tr. 748–761, 2730.) Nieves showed the wire to electrician William Stentz, who had 15 years' experience as an electrician. Stentz saw that the insulation was different. (Tr. 523–527.)

Despite the trouble Rob Johnson had in trying to find the proper wire, he denied at the trial that he recalled Nieves ever saying anything to him about the wire after receiving it. Answering the company counsel's specific questions, he denied that Nieves said it was the wrong wire, denied ever telling Nieves that it was okay to strip the wire, and denied ever becoming aware that Nieves had stripped the insulation (Tr. 2261–2262). I discredit the denials. As indicated, Johnson did not impress me on the stand as being a credible witness.

Nieves worked on the furnace between other assignments. By late May or early June he had finished replacing the wiring and making the proper inspections and control tests, but the Company was not ready for the startup (Tr. 605–615, 626–627, 773–775, 2748–2749). Because of this delay in the startup, the crew that installed the inductor and coil underneath the furnace did not also install the shorting or buss bar (a large block of pure copper). It was kept locked in storage for safekeeping. (Tr. 617–618, 864–869, 2595–2596, 2753–2755.)

When Nieves was advised of the July 10 furnace startup date, he again inspected all of the connections, perhaps 200 or 300 of them (Tr. 774–775).

(3) Cintron assigned to startup

On July 8, after the Company had decided to start the furnace on Saturday morning, July 10, Maintenance General Foreman Ellison first asked Nieves ''would you like to come in on Sunday [July 11] to work on overhead vent fans?'' Nieves said no, that he did not want to break any company rules (referring to the 40-hour workweek that Ellison announced in February). Ellison did not respond. (Tr. 628–629, 691, 709, 787, 2450.) As the company counsel elicited on cross-examination of Nieves, changing the roof vent fans ''is a very nasty job'' (Tr. 710).

Ellison then asked Nieves ''would you like'' to come in early that Saturday, July 10, at 3 a.m. instead of 6 a.m. ''to start up the No. 2 induction furnace?'' Nieves replied, ''No, sir, I would not like to come in'' (to work that 3 hours on overtime). It is undisputed that Ellison said okay and walked away, without instructing Nieves to come in to begin the furnace startup at the usual 3 a.m. hour. (Tr. 629, 709–710, 787–788.)

Ellison admitted giving Nieves the option of coming in early and admitted that Nieves offered to start the furnace at 6 a.m., his normal starting time (working on Saturday until 2:18 p.m. at straight time). Ellison did not explain why he first offered Nieves the ''very nasty job'' of changing the roof vent fans on Sunday before asking Nieves ''would you like to come in'' early on Saturday. (Tr. 2486–2487.) As found, this was the first time the Company offered Nieves any Sunday overtime work since early February.

Ellison assigned the furnace startup to electrician Juan Cintron (on the Monday–Friday shift), to whom he customarily assigned Saturday overtime work since Cintron signed an antiunion petition on January 27 (G.C. Exh. 40; R. Exh. 26 p. 5; R. Exh. 74).

Cintron told Nieves, ''I wish you would come in and start this furnace.'' He had never started a furnace before, having merely assisted Nieves. (Tr. 623–624, 630, 2285–2286.) At Cintron's request that Nieves show him ''what you did and how you do it,'' Nieves spent about 1 hour or 1-1/2 hours the following afternoon showing him ''everything that I had done,'' going through and explaining some of the startup procedures, and answering his questions. Cintron concedes: ''I looked at all the panels, and they all looked real neat. It was a real neat job.'' (Tr. 630–632, 796–797, 2303–2305, 2308–2309, 2744.)

Cintron reported to work for the 3 a.m. furnace startup that Saturday, July 10, but he had various problems and the startup was delayed about 4 hours (Tr. 527–532, 553–556, 1861). About 6:45 a.m. Ellison send for Nieves to assist him. Cintron had not been able to get any power to the furnace because the shorting bar had not been installed on the inductor coil. He had not followed the trouble-shooting procedure and checked to see if the shorting bar had been installed. He knew that it is kept ''in a locker to keep it from being stolen.'' Nieves readily found the problem. At 10:25 a.m., after the startup was proceeding well, Ellison instructed Nieves to return to another job. (Tr. 636–643, 798–800, 804–806, 816, 2322, 2401–2402.)

That afternoon, when Cintron was raising the power on the furnace, the faulty insulation on the wire caused arcing and burning. Ellison, Melt Supervisor Hensel, Cintron, and the nonelectrician maintenance employees on the job did not know what to do. Ellison admits that ''No, I did not'' have ''any idea what was the cause of the arcing'' and that ''I was . . . making communications with outside contractors to see if they could help us out.'' (Tr. 2511, 2542–2544.) Yet he never recalled Nieves, on overtime, to assist and diagnose the problem.

Cintron testified that he did not know why Ellison did not call Nieves to find out what was wrong (Tr. 2423). Ellison claimed that he never called Nieves back to the job ''Because the people I had there were more than capable of doing it'' and that Cintron was ''just as knowledgeable as Nieves in coping with this serious situation'' (Tr. 2534, 2537). I discredit these claims as obvious fabrications. Nieves credibly testified on cross-examination (Tr. 2760), ''I would have loved to have been there'' (to see what was wrong).

Those on the job (the inexperienced Cintron being the only electrician) tried using wooden boards to put out the fires as they turned the power on and off, trying to keep up the heat on the molten iron in the furnace. They spent much time checking, tightening, and recrimping connections that came loose from the overheating and cooling of the wire. They wrapped wire ends and connectors with rubberized splicing tape in a futile effort to stop the arcing and burning. Ellison admitted doing things in an ''unorthodox way'' and that the Federal government ''would be very upset with us'' if it would ''catch us'' doing it. Ellison finally decided to replace the wire. As they did this, they twice added more molten iron from another furnace to keep the furnace from ''freezing.'' Working frantically, they were able to replace the wire by 11 p.m., saving the furnace from destruction. (Tr. 534, 1861–1879, 1902–1907, 2341–2359, 2367, 2394, 2502, 2506–2508, 2536, 2606.)

(4) Nieves' summary discharge

On Tuesday morning, July 13, in the presence of General Superintendent Potts and Maintenance Supervisor-Buyer Rob Johnson, Vice President Baum summarily discharged Nieves (Tr. 644–645; R. Exh. 24) for

> [r]eckless neglect & deliberate dishonesty, shoddy workmanship resulting in the near loss of No. 2 furnace and previously committed production.

On Monday, the day before, Baum had conducted a so-called investigation— without saying anything to Nieves. Baum gave two explanations for not questioning Nieves (Tr. 1367–1368): (a) ''Because Mr. Nieves didn't have anything to do with the rewiring and bringing back up of the furnace after once it was in trouble'' and (b) ''Mr. Nieves is the expert, Mr. Nieves is the electrician and there was very little I could question him on, what he had done electrically.'' I discredit both explanations as obvious fabrications.

Baum made his ''investigation'' in the presence of Potts who, as found, had told General Foreman Dan Johnson to ''keep and eye on'' Nieves and ''if there's anything possible to get rid'' of him (Tr. 1340–1341, 1352, 2573.)

Baum testified (Tr. 1341) that he interviewed Rob Johnson (who authorized Nieves to use the faulty wire), Maintenance General Foreman Ellison (who gave much false testimony, including his claim that he did not call Nieves back to the job that Saturday afternoon because Cintron was ''just as knowledgeable as Nieves in coping with this serious situation''), and Melting Supervisor Hensel (who gave shifting, fabricated testimony in support of the Company's defense to the allegation that it discriminatorily discharged another principal union organizer, Rickie Porter). Baum claimed (Tr. 1352) that he believed he also talked to Cintron, but Cintron positively denied (Tr. 2392) talking to either Baum or Potts before Nieves' discharge.

Baum interviewed Rob Johnson even though Baum knew that he was not involved in the July 10 startup. I infer that Baum questioned him about his authorizing Nieves to use the faulty wire. When asked on cross-examination what Rob Johnson told him, Baum claimed (Tr. 1354), ''I don't recall anything Mr. Johnson said.'' Rob Johnson, in turn, falsely denied even being interviewed. Answering the company counsel's specific questions, he denied that he played any role in Nieves' discharge or in the investigation leading up to it, that he was aware of the investigation, and that he was ever questioned ''as part of it.'' (Tr. 2263–2264.)

Baum first falsely claimed (Tr. 1338) that ''No, sir,'' he was not ''involved in the decision to terminate Bill Nieves.'' Baum then *variously* testified (Tr. 1338, 1340, 1343, 1355, 1361, 1364) that Ellison made the decision and Ellison and Potts carried it out, that the decision to terminate Nieves was ''[b]ased upon my investigation,'' that the Company relied on the ''expertise'' of Ellison who was not an electrician, that Ellison recommended the decision and Baum agreed, that ''[o]nce the investigation was complete, I typed everything up and gave it to Mr. Ellison and Mr. Potts and the decision was made by Mr. Ellison,'' that ''Mr. Ellison and Mr. Potts made the decision,'' and finally that ''[i]t was Mr. Ellison's decision.'' I note that in its brief (at 114) the Company contends that ''[t]he decision to discharge Nieves was made singlehandedly by maintenance supervisor Jim Ellison.''

(5) Stated reasons for discharge

Baum admits (Tr. 1342, 2086–2088) that he prepared the three discharge documents in evidence (R. Exhs. 22, 23, and 25), based primarily on information from Ellison. None of the three documents makes any reference to the arcing and the burning wire that had to be replaced to save the furnace. On direct examination Baum gave the following explanation, which I deem incredible (Tr. 1343):

> Q. [By Stephen Sferra] And why was there nothing in here regarding the adequacy of the wire?
>
> A. There was no question about the adequacy of the wire.

When Ellison was asked on cross-examination about there being no mention of the faulty wire in his report to Baum, he not only admitted that he had mentioned it to Baum in the Monday interview, but also at least implied that he was aware that the wire had been ''modified'' (by stripping off the outer insulation). Ellison testified (Tr. 2623):

> Q. . . . [W]here does it mention that you thought the . . . insulation on the wire was the main problem?
>
> A. I did not enter that into there at that time.
>
> Q. You mean so you never told [Baum] about that?
>
> A. I *mentioned* [it] to him, but that was it because I was not a professional [electrician]. I could not give an exact reason for that failure. If it was exact—If it was 100% true that it was the wrong wire or *something had been modified to it.* So at that time I didn't want—I did not want that in the statement until I could make sure it was. [Emphasis added.]

Ellison was referring to his statement of reasons for the discharge in a memo to the file dated July 12 (R. Exh. 23). The memo was one of the three discharge documents that Baum prepared before discharging Nieves. It listed four purported deficiencies in Nieves' workmanship. Earlier Baum had testified, as quoted in part above (Tr. 1343):

> Q. [By Stephen Sferra] Does this report [the July 12 memo] reflect *all the problems* that were discovered with the furnace of July 10, 1993?
>
> A. *Yes.* [Emphasis added.]
>
> Q. If you review the report, there is nothing in here regarding the adequacy of the wire used by Mr. Nieves?
>
> A. No, sir.
>
> Q. And why was there nothing in here regarding the adequacy of the wire?
>
> A. There was no question about the adequacy of the wire.

First, according to the July 12 memo to the file, the control contactor coil was inoperable. Nieves credibly testified that he visually inspected and serviced all of the 30-odd contactor coils—the proper procedure for checking their condition. The only way to test them is to ''put voltage to them,'' as was done during the Saturday afternoon startup when one

failed, requiring a 15–20 minute repair job. (Tr. 606–608, 2329, 2500, 2602, 2699–2701.)

Second, loose connections were readily evident in the wiring. Those connections were not loose that Saturday morning when electrician William Stentz was assisting Cintron in trying to find the cause of no power to the furnace. He spent an hour with Cintron, checking the connections. The evidence clearly shows that connections were loosened during the startup by the overheating and cooling of the wires. This was caused by the arcing of wires through the insulation and the power being turned on and off. (Tr. 530–534, 556, 2349, 2741–2750, 2755–2756, 2759–2760.) Stentz impressed me most favorably as a truthful witness.

Third, the contactor was not hooked up. That condition did not exist that morning when Cintron and Stentz checked the connections (Tr. 556, 2726–2728, 2742).

Fourth, the buss (shorting) bar on the inductor coil had never been installed. The Company kept it locked in storage for safekeeping until the startup. Ellison admitted on cross-examination (Tr. 2590) that no checks or tests that Nieves made ''involved checking the buss bar.''

The July 12 memo to file refers to another memo to file that Baum prepared. This memo (R. Exh. 22) is entitled ''Furnace Failure July 10, 1993—Investigative Info.'' It concludes:

> The possible loss of the furnace is difficult to measure in dollars, but a good yardstick would be in excess of $180,000 just for rebuild and previously committed production loss during that period.

The third memo that Baum prepared (R. Exh. 25), dated July 13, is entitled ''Memo to File: Nieves Termination.'' In it Baum went further and alleged the three following conclusions and specifics as the grounds for discharging Nieves. *Still, there was no reference to the actual cause of the near loss of the furnace.*

> 1. Termination for reckless neglect and deliberate dishonesty as well as shoddy workmanship resulting in the very real possibility of melt furnace loss and resultant production loss [referring to loose fittings, contactor lines left lying on buss bar, bad coil, and assuring supervisor that final testing was done although ''very real probability'' not done].
>
> 2. Termination for gross neglect resulting in personal danger to fellow maintenance personnel. Those employees toiled for periods ranging from 11 to 23 hours on Saturday July 10th to repair damage, attach new parts, and properly test the electrical system on the No. 2 furnace [and referring to employees working beyond normal hours to prevent furnace freezing, caused by parts not being installed properly].
>
> 3. Termination for a possible premeditated attempt to cause harm to others [referring to Nieves' previous installations and no reason for ''missing parts or incomplete wiring'' and to Nieves' refusing opportunity for overtime on startup].

Nieves had not been present during the startup after Ellison sent him back to another assignment at 10:25 a.m. that Saturday. He was, however, present in the courtroom throughout the trial, assisting in the General Counsel's presentation of the case.

When recalled as a rebuttal witness, Nieves credibly testified (Tr. 2745): ''From the testimony that . . . I've heard, I really don't think I did anything wrong.''

(6) Altered wire

By the next to the last day of trial, the Company apparently realized the strength of the evidence against its defense that it discharged Nieves for the four purported deficiencies in Nieves' workmanship listed in Vice President Baum's July 12 memo to the file. The Company must have also realized that Baum's false testimony at the trial on June 13, that ''There was no question about the adequacy of the wire,'' was an indefensible position in view of the required replacement of the wire to save the furnace.

It was then that the Company produced altered wire at the trial to broaden its purported justification for discharging this principal union organizer.

On June 16 the Company produced a piece of the wire that Nieves had used, after he stripped off the spiraling copper wire and outer insulation. The remaining insulation on this piece of wire clearly showed the grooves where the spiraling wire had been removed. The surface of this insulation, however, was different. The inner insulation on the wire that Nieves used was tacky, sticky, and more grayish, like a dirty black. The insulation on this piece of wire evidently had been polished. It was a shiny black. (Tr. 600, 2697–2699, 2762.)

The wire as it came from the supplier had the voltage rating printed on the outer insulation. As would be expected, there was no writing or printing on the inner insulation underneath the layer of outside insulation, either over or under the spiraling copper wire. (Tr. 598, 753, 2730.) Because it was a special application wire, there would have been no reason (even if it were practicable) for the manufacturer to have placed the voltage rating or other printing on the inner insulation. Any printing on the inner insulation would never be seen—unless misused, as in this case.

Yet this piece of wire, that was produced in the courtroom but not offered in evidence (Tr. 2689), had not only a smooth, polished surface, but also the printing on it, in ''very clearly visible'' white lettering (Tr. 2383, 2730): ''*Semi-conducting* [emphasis added], remove when terminating or splicing.''

(7) Shifting positions

The production of this altered wire resulted in great confusion in the testimony of Maintenance General Foreman Ellison, who claimed that he made the decision to terminate Nieves.

When called on the last day of the long trial, Ellison testified (Tr. 2623, as quoted above) that he did not want any reference to the insulation problem included in his list of Nieves' four purported deficiencies in the July 12 memo to file (R. Exh. 23) that Baum was preparing:

> A. I mentioned [it] to [Baum], but that was it because I was not a professional [electrician]. I could not give an exact reason for that failure. If it was exact—If it was 100% true that it was *the wrong wire* or something had been modified to it. So at that time I didn't

want—I did not want that in the statement *until I could make sure* it was. [Emphasis added.]

Ellison gave much conflicting testimony in an apparent effort to support this company position, yet acknowledge seeing the purported ''Semi-conducting'' lettering on the wire.

Ellison testified (Tr. 2550) that no, he did not ''know at that time that the wire had been stripped.'' He testified (Tr. 2552) that ''We did determine that [Saturday] evening, that it was the wrong wire and insulation had to have been stripped.'' He testified (Tr. 2554) that no, that Saturday evening he did not notice the grooves where the wire had been stripped off'' and that ''It was, probably, the next day before we figured out what the exact problem was. . . . That the outer core had been removed from it. It was, at least, one day later.''

Ellison testified (Tr. 2555) that ''the following day or day and a half . . . *I looked at the wire and it says semi-conducting on the wire and, knowing what I do about electricity, is that current is going to flow through that piece* [emphasis added].'' He also testified (Tr. 2555): ''On Sunday, no. I don't think that had been determined that it was stripped wire at that time'' and ''I did not . . . give it a thought that that . . . groove, was a mark from the copper wire on Sunday. No, I didn't.'' He testified (Tr. 2556), ''When we found out, after checking our records and things of that sort, that we found out that that was not a normal wire. . . . That's when we determined that it was a stripped situation. . . . It was, probably, a few days later. I'm not sure of the exact date.''

Ellison testified (Tr. 2557) that ''I think the final determination was that the exact type of wire that was used and stripped was found after he was discharged yes'' and ''No, I don't think I did know'' before he was discharged that he had to strip this wire to use it.

Ellison testified (Tr. 2558) that ''Semi-conducting wire—and I'm not a professional—[means] that some current will flow through the insulation.'' He testified (Tr. 2559) that yes, he saw that writing on the insulation that Saturday night, and although Nieves had a ''very good'' record, ''I did not ask him that'' because ''he is supposed to be the professional on what to use.'' He testified (Tr 2560–2561), when asked what was his opinion that Saturday night, ''My opinion is that he should have seen the wording that was on the side of it. *It's obvious* [emphasis added]. . . . I have no idea why he would do it. . . . The only thing that I thought about that job right there that night that it was atrocious workmanship.''

Ellison testified (Tr. 2562) that ''*I thought* [at the time] *he did it on purpose* [emphasis added].''

Ellison testified (Tr. 2572) that he discussed the situation on Sunday, the next day, with Potts and reached a final decision in his mind on Sunday to terminate Nieves for ''gross neglect of the job.'' Although Ellison positively testified (Tr. 2557), ''Mr. Nieves was discharged not for the wire,'' he testified (Tr. 2577), ''The only way that that many mistakes could be made is to basically do it on purpose. . . . I had an opinion on it at that time that it was the wrong wire'' and ''Yes,'' that was a factor in his decision, but ''At that time I didn't have proof that it was the wrong wire.''

Ellison testified (Tr. 2575) that the July 13 corrective action form (R. Exh. 24)—which bears the signatures of Rob Johnson, Baum, and Potts, but not Ellison's signature—was handwritten by Potts in a meeting where Potts ''was listening to me, basically.'' As quoted above, the corrective action form reads, ''Reckless neglect & deliberate dishonesty, shoddy workmanship resulting in the near loss of No. furnace and previously committed production.''

When Ellison was asked if it was obvious at that time that the wrong wire was used ''because, for one thing, the lettering on the insulation,'' he testified (Tr. 2578), ''It was obvious to me [emphasis added], yes, that it was the wrong wire.''

It was after Ellison gave his repeated testimony that it was obvious to him from the ''Semi-conductive'' lettering on the replaced wire it was the wrong wire, that he reverted to the Company's former position as quoted above (Tr. 2623), testifying that he was not sure it was the wrong wire.

I find it clear that Ellison was not prepared to reconcile the Company's former position, that it had discharged Nieves for certain purported deficiencies in workmanship, with the implications of the altered wire. If the ''Semi-conductive'' lettering on the altered wire actually had been printed on the stripped wire that Nieves had used, the Company certainly would have discharged him for sabotage.

I note that the Company further shifted positions when both Cintron and Ellison testified that Nieves, in preparing for the startup, had rewired only the east side and not the west side of the panel. To the contrary, Cintron conceded in his handwritten statement, written 3 days after Nieves' discharge, ''We replaced all the wiring'' (G.C. Exh. 66 p. 20; Tr. 2406).

Not only did Nieves credibly testified that he replaced all the wire (Tr. 594–595, 782, 2699), but Merritt Bumpass (the Company's attorney at the time) gave testimony as a defense witness, confirming the fact that all of the wire had to be replaced.

Bumpass credibly testified (Tr. 1751–1753, 1755–1756) that on July 13, the date of the discharge, Baum faxed him copies of the three discharge documents and the corrective action form (R. Exh. 40), that he read and then talked to Baum about the material, and that he made notes on the documents of ''facts that were of interest to me for possible future reference down the line.'' He wrote on the copy of the July 12 memo to file: ''All wiring had to be replaced.''

Moreover in a August 20 statement in which Bumpass provided the Regional Office ''a summary of the Company's position'' (G.C. Exh. 53, attachment B, p. 4), Bumpass represented that ''the Company had to rewire the entire panel.'' There is no contention that the attorney prepared the position statement without consulting with the Company or that the Company was not aware of the contents of the statement.

I deem the attorney's notation on the July 12 memo to file (''All wiring had to be replaced'') and his August 20 position statement (''the Company had to rewire the entire panel'') are company admissions that all the wires were replaced. I discredit the Company's belated denials.

The Company spends 27 pages of its long brief (at 114–140), arguing that it lawfully discharged Nieves and did not violate Section 8(a)(3). I note that finally, on the 27th page of the argument, the Company admits that ''the major failing of July 10 was the wire itself.'' Nowhere in the brief does the Company refer to the grossly conflicting testimony that Ellison gave in his futile efforts at reconciling the Company's position that it discharged Nieves because of four pur-

ported deficiencies and the Company's shifted position that Nieves used wire with ''Semi- conducting'' printed on it.

The Company concludes in its brief (at 140) that ''if Ellison had considered the wire issue in his discharge decision, it would have strongly confirmed the propriety of discharge and not changed that result.''

The Company gives no reason for not having discharged Nieves for sabotage if Ellison's testimony (Tr. 2555) were true that ''I looked at the wire [before Nieves' discharge] and it says semi-conducting on the wire and, knowing what I do about electricity, is that current is going to flow through that piece,'' and his testimony (Tr. 2562) that ''I thought [at the time] he did it on purpose.''

(8) Concluding findings

I find it clear that the General Counsel has made an overwhelming prima facie showing that William Nieves' leadership in the union organizing drive was a motivating factor for the Company's decision to discharge him. Since February Nieves had been a target for discharge.

I find that the Company has failed to meet its burden to demonstrate that it would have discharged Nieves in the absence of his being a principal union organizer. I particularly rely first on the clear evidence that the original stated grounds for the discharge were pretextual and second, on the Company's shift in positions to bolster its defense. It belatedly admitted that the wire that Nieves used was faulty, then blamed Nieves for its use by producing altered wire with ''Semi-conducting'' very clearly printed on it. I find that these shifted positions and the altered wire reveal that Vice President Baum deceitfully prepared discharge documents to justify a discriminatory discharge.

I therefore find that the Company discriminatorily discharge William Nieves on July 13, 1993, in violation of Section 8(a)(3) and (1).

(9) Referral to Justice Department

I consider the production at the trial of the altered wire with the ''Semi-conducting'' printing on it and the presentation of false testimony in support of the Company's shifted position for discharging Nieves, relying on the altered wire, to be an extreme abuse of the Board's processes.

The Company admits (Tr. 2688–2689, 2692–2693) that the wire that was replaced has been kept locked in Vice President Baum's office since July 12 (the day before Nieves' discharge). Unless it has been destroyed since the trial, it should be readily available for comparison with the piece of wire that was produced at the trial.

I recommend that this matter be referred to the Justice Department for investigation and any appropriate action.

7. Actions against Robert Bunting

As found, Robert Bunting was one of the five principal union organizers named by President Foster (along with Nieves, Steve and Rickie Porter, and Oestreicher). Potts had given instructions to Dan Johnson to get rid of Bunting and other union organizers.

As further found, the Company gave Bunting a final warning of termination as a solicitation violator on March 24, the day after his photograph with Nieves and Steve Porter was prominently displayed on the front business page of a local newspaper under the banner headline, ''UNION THREAT PLAGUES FOUNDRY.'' The Company had received only one written complaint accusing him of union solicitation, and that complaint did not allege that the solicitation was on working time.

On May 17 Bunting was doodling his name on a slip of suggestion-box paper while using the telephone in the lunchroom on his lunchbreak. The next day, Core Room Supervisor John Kendle gave him a written warning for ''Destruction company property'' (R. Exh. 8). Bunting asked ''Why are you doing this to me?'' It is undisputed that Kendle answered: ''Buzz, it is not me. It is the Company and I am part of this Company.'' (Tr. 1081–1082.)

I find that this second written warning was intended both to harass Bunting and to build a case against him for his eventual discharge. I therefore find that the warning was both coercive and a reprisal for his union organizing, violating Section 8(a)(3) and (1).

Sometime in September Bunting was relieving one of the employees on the ram line crew in the No. 1 foundry, where he had formerly worked. Kendle saw him and asked ''what the f__ck'' he was doing there. Bunting said he came in to work so that another employee could have the weekend off. Kendle said ''that is news to me,'' but permitted Bunting to finish the shift. (Tr. 1083–1085.)

The next day when Bunting asked Kendle if he could stay and work again, Kendle said, ''You're going home . . . You are not a part of the original crew.'' Bunting later asked the immediate supervisor, Foreman John Gollmar, if he had ''a problem with me working in No. 1 for your guys?'' Gollmar's response was: ''Buzz, it's ain't me. I try to stay out of the politics around here.'' Kendle denied remembering that he observed Bunting working overtime in the No. 1 crew, that he asked him ''What the f__ck are you doing here?'' or that he told him to ''Get back to your own department.'' (Tr. 1085–1086, 2118–2119.)

I discredit Kendle's denials and find that Kendle discriminated against Bunting in distributing overtime because of his union organizing, violating Section 8(a)(3) and (1).

The General Counsel contends that the warning that Kendle gave Bunting in October for not wearing safety glasses was further harassment. I find, however, that Bunting did violate the company rule requiring the wearing of safety glasses on the job and that the warning was justified. (Tr. 2128–2133.) I therefore find that the allegation must be dismissed.

On November 8, Attorney Bumpass interrogated Bunting in preparation for the Company's defense to the allegations that it discriminatorily discharged Nieves and Rickie Bunting. The General Counsel contends that this interrogation was unlawful because Bumpass failed to first give the assurances against reprisals, etc., required by *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964). Bumpass, however, specifically remembered first giving Bunting the assurances. (Tr. 1742–1745.) I therefore find that the allegation must be dismissed.

8. Warning of Daniel Oestreicher

Shakeout man Daniel Oestreicher, Bunting's brother-in-law, was the remaining one of the five employees named by President Foster as the principal organizers (Tr. 67–68). The other four were Nieves (discharged on July 13), Rickie Por-

ter (discharged on March 17), and Steve Porter and Bunting (both threatened with discharge and discriminated against).

Although Core Room Supervisor Kendle admitted on cross-examination that it was ''okay for an individual to go get a Coke and drink it on the job'' (Tr. 2137–2138), on August 5 he and Shakeout Foreman Carmelo Rivera saw Oestreicher drinking a soda and talking with Bunting. Oestreicher was waiting for another employee to finish clamming up sand before he resumed the shakeout work. (Tr. 982–985.)

As found above, Kendle was the supervisor who gave Bunting a written warning on May 18 for ''Destruction company property'' (a slip of suggestion-box paper), explaining that ''it is not me. It is the Company and I am a part of the Company.''

This time, on the next morning, Rivera gave Oestreicher a corrective action form (R. Exh. 53), as a ''Verbal warning'' for ''Nonperformance.'' It is undisputed that when Oestreicher protested, Rivera responded, ''Dan, it is not me . . . I know you are not a lazy man . . . The front office made me do it.'' (Tr. 985.) Kendle testified that Potts made the decision and that Kendle agreed with it (Tr. 2123).

I find that the warning was both coercive and a reprisal for his union organizing, violating Section 8(a)(3) and (1).

9. Discharge of Stephen Carroll

a. *Joined organizing committee*

Until February 13, 1994, cleaning department employee Stephen Carroll had been an open supporter of the Union. He wore a union cap to and from work, wearing it until he clocked in, and sometimes wore it in the lunchroom. He also prominently displayed a UAW UNION YES bumper sticker on his van (G.C. Exh. 42), which he parked in open view near the exit gate. He passed out union cards and pamphlets in the lunchroom. He regularly attended union meetings. (Tr. 1001–1009.)

On February 13 Carroll announced to International Representative Vasi at a union meeting ''in front of other people that were at the meeting'' that he ''wanted to get more involved'' in the organizing campaign. He signed up to become a member of the ''In-Plant Organizing Committee.'' (Tr. 1009–1010; G.C. 44.)

Five weeks later on March 19, the Company discharged Carroll purportedly for absenteeism.

b. *Misrepresentation of company records*

Before this discharge, the Company had kept a separate computer record of Personal Illness (PI) absences and Unapproved Absence (UA) absences.

Carroll had received two suspensions for absenteeism in years past. Three years earlier, in 1991, he received a 3-day suspension. Two years earlier, on July 25, 1992, he received a 1-day suspension. Carroll incorrectly recalled that the 1-day suspension was in 1991 and the 3-day suspension was in 1992. (Tr. 1045; R. Exh. 66.) Computer printouts in evidence show that in 1992, before the July 25 suspension, he had five unauthorized absences and four personal illness absences (G.C. Exh. 61 p. 1).

Carroll recalled that in July 1993 his supervisor Robert Sopko (who did not testify) said ''he was going to put a note in my files that I was missing too much work,'' but Carroll never saw the note (Tr. 1014). The computer printouts show that between the time of the 1992 1-day suspension and this warning of a note in his file, Carroll had seven unauthorized absences and two personal illness absences (G.C. Exh. 61 pp. 1–3).

I note that by the time the July 25, 1992 corrective action form for the 1-day suspension was introduced in evidence, it has ''Remarks'' at the bottom of the page (seemingly in more open handwriting): ''Any further absenteeism will result in termination for this employee.'' Carroll denied on cross-examination (Tr. 1046) that ''you were [then] told any more absenteeism and you could be terminated.'' The Company has offered no explanation, if such a final warning were made at the time, for the Company's failing to discharge Carroll for the continued absenteeism—before Carroll's open announcement at the union meeting that he wanted to get more involved in the organizing campaign.

The December 2, 1993 computer printout of the 1993 absences through November 30, 1993 (G.C. Exh. 61 pp. 2–3), and the initial printout of the 1994 absences (G.C. 8, p. 2 of the attachment to the Company's April 21, 1994 ''Statement of Position'') show that since July 1993 Carroll had only two unauthorized absences (on October 9 and November 13, 1993) and two personal illnesses (on February 14 and March 18, 1994, both after Carroll's announcement at the union meeting). The ''PI'' absence on March 18, 1994, is handwritten on the initial 1994 printout.

I note that by the time of the May 9, 1994 computer printout of the 1994 record (G.C. Exh. 61 p. 4)—2 weeks before the first day of the trial—the computer record shows a ''UA'' absence on March 18, 1994, not a ''PI'' absence as written on the initial printout.

Meanwhile, whoever prepared the March 19, 1994 corrective action form, signed by Robert Sapko for the discharge of Carroll (R. Exh. 65), combined the UA and PI absences in the Reason for Action: ''13 day's absent since receiving a final warning [on July 25, 1992] for absenteeism.''

The company records (before the May 9, 1994 printout) showed only nine UA absences in that period of over a year and a half and four PI absences (on October 24, 1992, July 23, 1993, February 13, 1994, and March 18, 1994).

The purpose of combining the UA and PI absences is made clear in the Company's April 21, 1994 statement of position. The statement represents that under the Company's policy of progressive discipline, excessive ''unexcused'' absences will result in disciplinary action and that sick days ''are counted as unexcused absences, although the employee's supervisor may excuse a particular absence in appropriate circumstances.''

Again in its brief (at 141), the Company contends that sick days ''are counted as unexcused absences, although the employee's supervisor may excuse a particular absence in appropriate circumstances.'' Not only is this contention belied by the Company's computer records, showing that sick days are ''PI'' days and not ''UA'' days—unless the records are changed, as above—but there was no evidence at the trial to support the contention. The only purportedly supporting evidence is the cited testimony by Vice President Baum (Tr. 972) that:

> Q. [By Stephen Sferra] Now if . . . an illness or whatever, or the person had some kind of problem, it

is up to the foreman then? He makes that determination, does he not?

A. The foreman is the person who manages the program in his department, that is correct.

I find that the contention in the position statement and in the brief misrepresents the Company's own records.

c. *Fabricated final warning*

The computer records show that after July 1993 (when Sopko said he was going to put a note in Carroll's file for missing too many days), Carroll had only two ''UA'' absences, on October 9, 1993, and November 13, 1993 (G.C. Exh. 61 pp. 2–3).

Yet the Company contends, without any supporting testimony by Supervisor Sopko and contrary to Carroll's testimony, ''It didn't happen'' (Tr. 1054–1055), that ''on January 14, 1994, Sopko issued yet another 'final warning' to Carroll that any additional unexcused absences would result in his discharge.''

The Company cites in its brief (at 142) a handwritten note (R. Exh. 67) purportedly written by Sopko, stating that he told Carroll ''that if he did not straighten his record up as of this day, he gave me no other choice but to discharge him'' and that he told Carroll ''that I could discharge him right now because he has been absent *12 day's* [emphasis added] since receiving his last and final notice.''

Thus, like the preparer of the March 19 discharge document, the person preparing this note was combining ''UA'' and ''PI'' absences, even though the Company's absentee policy applies only to unexcused absences (as the Company admits in its brief) and the computer records do not show ''PI'' absences as ''UA'' absences.

The Company has not asserted that Sopko was unavailable to testify at the trial. As the General Counsel submits in his brief (at 44), I infer ''that Sapko's testimony would not have been favorable'' to the Company's position.

I credit Carroll's denials and find that the purported January 14, 1994 ''final warning'' was fabricated.

d. *Concluding findings*

Although there is no direct evidence that Carroll's announcement at the February 13, 1994 union meeting, that he ''wanted to get more involved'' in the organizing campaign, was reported to the Company, I find that the Company's conduct in discharging Carroll after he had two sick days reveals that it was again discriminating against a union organizer.

I find that the General Counsel has made a prima facie showing that Stephen Carroll's union organizing was a motivating factor for his discharge and that the Company has failed to meet its burden to demonstrate that it would have discharged him in the absence of his union activity.

CONCLUSIONS OF LAW

1. By discriminatorily discharging Rickie Porter on March 17, 1993, William Nieves on July 13, 1993, and Stephen Carroll on March 19, 1994, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. By discriminatorily suspending William Nieves on February 12, 1993 and Steven Porter on February 28, 1994, the Company violated Section 8(a)(3) and (1).

3. By discriminatorily denying William Nieves and Steven Porter assignments of Saturday overtime after May 10, 1993, and denying Steven Porter assignments of Sunday overtime after July 12, 1993, the Company violated Section 8(a)(3) and (1).

4. By discriminatorily issuing a written warning to Robert Bunting on May 18, 1993, and denying him assignments of weekend overtime beginning in September 1993, the Company violated Section 8(a)(3) and (1).

5. By discriminatorily issuing a verbal warning to Daniel Oestreicher on August 6, 1993, the Company violated Section 8(a)(3) and (1).

6. By threatening to terminate William Nieves, Steven Porter, and Robert Bunting on March 24 and Richard Moran about that date, the Company coerced employees in violation of Section 8(a)(1).

7. By engaging in coercive surveillance of union supporters at the foundry, the Company violated Section 8(a)(1).

8. By threatening to sell the Company and by soliciting employee complaints and implying it would remedy grievances if the employees abandon the Union, the Company violated Section 8(a)(1).

9. By distributing a forged union notice to intimidate union supporters, the Company violated Section 8(a)(1).

10. By distributing a form letter for employees to sign to request the return of union authorization cards, the Company violated Section 8(a)(1).

11. By rendering unlawful assistance to Workers United with Employer by providing it with money and letterhead paper and by disparately enforcing the no-solicitation rule, the Company violated Section 8(a)(1).

12. The General Counsel has failed to prove that the reduction of Sunday overtime in February 1993 and the distribution of Saturday overtime before May 10, 1993, were unlawful.

13. The Company's former attorney did not coercively interrogate an employee.

14. The Company did not issue an unlawful warning for failure to wear safety glasses.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]